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FROM CONFISCATION TO CONTINGENCY CONTRACTING:  
PROPERTY ACQUISITION ON OR NEAR THE BATTLEFIELD

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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U.S. Army

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FROM CONFISCATION TO CONTINGENCY CONTRACTING:  
PROPERTY ACQUISITION ON OR NEAR THE BATTLEFIELD

by Captain Elyce K. D. Santerre

ABSTRACT: This thesis examines property acquisition overseas during and immediately following combat deployment. A review of pertinent international law and U.S. domestic contract and fiscal law raises the issue of whether application of peacetime domestic fiscal and contracting principles to combat deployments creates unnecessary problems. This thesis concludes that commanders can avoid many of these difficulties through prior planning, but that some statutory and regulatory changes are warranted.

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## I. INTRODUCTION

While the mechanics of acquiring logistical support on or near the battlefield is receiving considerable attention lately,<sup>1</sup> much work remains to be done. Doctrine on contingency contracting is still in the early stages of development.<sup>2</sup> The vast majority of contracting officers are civilians, not soldiers who will be deploying with the force they support.<sup>3</sup> Contracting mechanisms to pay for seizures and requisitions do not exist, except as ratifications of "unauthorized commitments."<sup>4</sup> The contracting system "worked" in Grenada primarily because the duration of the armed conflict was limited. This enabled contracting and Corps of Engineers personnel to arrive in country after the shooting had stopped, but still only a short time after a number of informal obligations had been made.<sup>5</sup>

This thesis will examine the current state of the law relating to contingency contracting. Contingency contracting, as used in this thesis, refers to contracting in the early stages of a combat deployment.<sup>6</sup> Recent developments in doctrine will be considered in making recommendations to commanders and their legal advisors on how best to utilize contingency contracting under current law. Recommendations for change form the final section of this thesis.

## II. LAW OF WAR LIMITS ON COMBAT ACQUISITION

A review of the current law would not be complete without a review of the international law applicable to acquisition of property on the battlefield or in occupied territory. Although, as will be discussed later, compliance with international law is only a first step -- a bare minimum of



legally acceptable behavior -- it is a necessary first step. A violation of contracting regulations and statutes may result in a commander becoming personally liable for payment of a contract or answerable for a domestic "white collar crime." A violation of international law in this area could result in a commander being charged with a violation of the law of war.<sup>7</sup>

### **A. Definition of Terms**

Definition of three apparently very similar terms -- confiscation, seizure, and requisition -- is required before proceeding. "Confiscation" refers to permanent appropriation of enemy property without payment of compensation.<sup>8</sup> "Seizure" is similar to confiscation in that it refers to a taking of property without immediate payment of compensation; however, items "seized" must be returned, or compensation paid for them, at the end of the armed conflict.<sup>9</sup> "Seizure" is used by some writers to refer to any uncompensated appropriation, without distinguishing confiscation;<sup>10</sup> however, in this thesis it will be used in its narrower sense. "Requisition" refers to appropriation of private property in occupied areas for the needs of an army of occupation. Compensation must be paid for requisitioned property as soon as possible.<sup>11</sup>

The circumstances for use, and limitations on the use, of each of these three methods of property acquisition depends on the location and the nature of the property acquired.

### **B. Property Captured/Found on Battlefields**

Rules governing property captured or found on the battlefield turn on whether the property is public or private,

with additional rules pertaining to certain specific classes of protected property.

## **1. Enemy public property**

### **a. In general**

Enemy public property found on the battlefield presents few law of war problems. In general, it may be confiscated or destroyed if "military necessity" requires such confiscation or destruction.<sup>12</sup> An action is justified by military necessity if it is "indispensable for securing the complete submission of the enemy as soon as possible" and not forbidden by international law.<sup>13</sup> A duty to pay compensation for enemy public property arises only if the law of war is violated.<sup>14</sup> The commander does not have completely free rein, however, in determining what constitutes military necessity. One commentator suggests a "reasonably prudent commander" rule -- that confiscation or destruction is legally justified if a "reasonable prudent commander acting in compliance with the laws of war"<sup>15</sup> would "have authorized such destruction or seizure under similar circumstances."<sup>16</sup>

### **b. Protected targets**

Specific types of enemy public property are accorded additional protection. The major categories of such property are the traditionally protected targets: religious and medical buildings, historic monuments, and buildings used for art, science or charitable purposes. When properly marked and not used for military purposes, they not only are forbidden as targets for destruction,<sup>17</sup> but also enjoy certain immunities against seizure or confiscation.

### Medical property

Medical establishments, if captured, must be permitted to continue to operate as such, at least until other treatment is secured for the patients found there.<sup>18</sup> Medical transport may not be confiscated except in the case of forced landings due to bad weather, mechanical breakdowns or similar situations. In such cases, the personnel aboard may be taken prisoner (or retained, depending on their status) and the aircraft or other medical vehicle may be confiscated.<sup>19</sup> Again, this is subject to the requirement that the capturing forces ensure proper care for the patients.<sup>20</sup> In any case in which medical transport is used for non-medical purposes, any protective markings must, of course, be removed.<sup>21</sup> All other medical equipment may be confiscated, but only after ensuring that the wounded and sick receive proper care. Under no circumstances may captured medical supplies be deliberately destroyed.<sup>22</sup>

If medical supplies, equipment, or buildings are the property of a relief society recognized under the Geneva Conventions, they may be requisitioned, but not confiscated or seized, for urgent medical needs.<sup>23</sup> "Fair" compensation must be paid for "requisitioned" property.<sup>24</sup> Use, not strict legal title, is the key to whether items are the property of a relief society.<sup>25</sup>

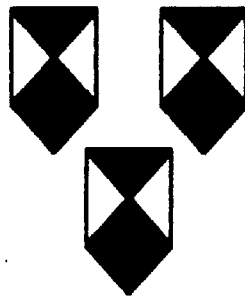
### Cultural property

"Cultural property" is also to be afforded special protection. It is treated as private property, even if publicly owned.<sup>26</sup> Buildings dedicated to art, science, etc., may be used for quartering of troops, storage of supplies, and similar uses if necessary, but any damage must be avoided to the fullest extent possible.<sup>27</sup> Religious buildings, as a matter of U.S. policy, are to

be used only for medical needs, and only when urgently needed.<sup>28</sup> Moveable cultural property may enjoy an additional form of protection, which extends to the truck, train, or other vehicle carrying it. When cultural property is being transported to a place of safety, as provided for in Articles 12 or 13 of the 1954 Hague Convention on Cultural Property, it may not be confiscated or seized, and "the means of transport exclusively engaged in the transfer of such cultural property" is also immune from confiscation or seizure.<sup>29</sup>

### *Identifying cultural property*

Protected cultural property can be identified by its required distinctive markings: three blue and white shields in a triangular formation (one shield below). The individual shields consist of " ... a royal blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle."<sup>30</sup>



## **2. Private property found on the battlefield**

Private property found on the battlefield poses additional issues which must be considered by the combat commander.

The main distinction is that a taking of private property, even when lawful, generally gives rise to an obligation to pay for it.<sup>31</sup>

The rules governing most private property, regardless of whether it is found on the battlefield or in occupied territory, are the same;<sup>32</sup> thus, private property will not be discussed in detail in this section. However, one problem worth noting is the potential difficulty of distinguishing between private and public property. The Hague Regulations were written when public and private property were much more distinctive in nature.<sup>33</sup> The intervening years have seen not only the rise of socialism and the nationalization of industries, but also the privatization of some previously government-operated "commercial activities."<sup>34</sup> In many parts of the world, an oil derrick may well be public property. In the United States, the lawn mower used to cut the military parade field may be private property.

a. Distinguishing public property from private property

The primary criterion for distinguishing between public and private property is that of beneficial ownership, rather than title. For example, private funds remain private property even when deposited in a government bank.<sup>35</sup> When ownership is mixed, part public and part private, compensation to the private owners may be required in proportion to their ownership interest in the property.<sup>36</sup> United States policy is to treat property of unknown ownership as public property until its true ownership can be determined.<sup>37</sup>

Some clearly "private" property, in the usual sense of this term, is treated as if it were public property. Even if privately owned, individual "arms, horses, military equipment and military documents" may be confiscated.<sup>38</sup> Pictet's Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War

gives a broad reading to these categories. "Arms" includes ammunition and accessories. "Horses" should be read as including any "individual means of transport," such as motorcycles, skis, or bicycles. "Military equipment" means articles "solely for military use, such as optical or precision instruments, portable radio sets, component parts of weapons, pioneer tools, etc." "Military documents" means documents other than identity papers, such as "maps, regulations, written orders, plans, individual military records, etc."<sup>39</sup>

b. Property of Prisoners of War (POW's)

Certain items of property in the possession of a POW are protected, even if owned by the state. Personal effects, clothing, protective articles, eating implements, and small sums of money possessed by POW's may not be confiscated. "Articles of value" may be taken for safekeeping only, and the prisoner is entitled to a receipt.<sup>40</sup> Retained personnel (medical personnel and chaplains) are entitled to retain their personal belongings and to take these belongings with them when repatriated.<sup>41</sup>

Enforcement of the protection of POW's property has not always been entirely successful.<sup>42</sup> Major General Robert M. Littlejohn, chief of the U.S. Army's quartermaster services in the World War II European Theatre of Operations complained at one point:

I have no defense for [requisitions to support] POW's turned over to me practically naked. What happens to their mess gear? and their blankets? They must have had something, somewhere.<sup>43</sup>

### c. Private property used or damaged during military operations

An exception to the general rule requiring compensation for private property is the absence of any requirement to pay for such property used or damaged during actual military operations. For example, fields of fire may be cleared through a wheat field without paying the farmer for the loss of the crops. Buildings may be used for shelter of troops or the sick and wounded, and no rent need be paid.<sup>44</sup>

To summarize, public property on the battlefield (with the exceptions noted above for medical and cultural property) may be taken without compensation whenever required by military necessity. Private property may be used temporarily in the course of operations without an obligation to pay for it, but otherwise is subject to the same requirements for compensation as property seized or requisitioned in occupied territory.

### C. Property in Occupied Areas

Property rules grow more complex in the realm of military occupation. A first complexity is in determining at what point in time "occupation" begins. This is a factual determination, based on when control of the territory shifts from the prior government to the invading army.<sup>45</sup> Article 42 of the Hague Regulations provides that occupation exists when territory " ... is actually placed under the authority of the hostile army."<sup>46</sup> Oppenheim, in his treatise on international law, quite correctly describes that definition as " ... not at all precise, but it is as precise as a legal definition of a fact such as occupation can be."<sup>47</sup> The fact of occupation is frequently evidenced by the invading army issuing a proclamation declaring a state of

occupation,<sup>48</sup> and this is the practice of U.S. forces.<sup>49</sup> As long as the date of declared occupation is at least a reasonably close approximation of actual occupation, it is unlikely to be challenged in the absence of substantial subsequent resistance.<sup>50</sup>

## **1. General rules applicable to property in occupied areas**

Property in occupied territory can be divided into several categories. Public property can be real property, including public works, cultural property, military property, and other moveable property not included in the other categories. Private property can be categorized as real property, property susceptible to direct military use, and other private property.

Regardless of the type of property involved, an overriding requirement is that the needs of the civil population be provided, particularly as to food and medical supplies.<sup>51</sup> This can severely limit the items which can be legally seized or requisitioned, and may even require that the occupation forces import goods for the civil populace, rather than requisitioning goods from them.<sup>52</sup> For example, more than 2,500,000 tons of supplies of all kinds, including 1,000,000 tons of wheat and flour, were imported by the Allies into occupied Italy in the spring of 1945.<sup>53</sup> A wide variety of supplies may be required. In February of 1945, nipples for baby bottles were in such short supply in Belgium that the lack of them was considered "prejudicial to military operations."<sup>54</sup>

A corollary to this is that property in occupied areas may not be destroyed unless absolutely necessary for military operations.<sup>55</sup> Destruction, if any, must be limited, to the extent possible, to facilities with a direct military use, such as railroads, airfields, and military barracks.<sup>56</sup>



## **2. Ownership of confiscated, seized or requisitioned property**

Still another important point to be considered, regardless of the type of property concerned, is that any property confiscated, seized, or requisitioned becomes the property of the capturing state, not that of individual soldiers.<sup>57</sup> U.S. policy expressly forbids individual soldiers to profit from their position in an invading or occupying force, even from business dealings that would otherwise be legal.<sup>58</sup> Although not technically in an "occupied area," the initial house-to-house search in Grenada provides an instructive example. When complaints were received that U.S. soldiers were taking private property, the commanding general issued strong guidance and began nonjudicial punishment proceedings. He made it clear that theft remains theft, and the problem abated.<sup>59</sup>

## **3. Public real property and cultural property**

An occupying army may take control of public real property, but does not and cannot become its owner, only its "administrator and usufructuary."<sup>60</sup> Thus, the property cannot be sold and must be preserved from wasteful or negligent damage to its value. Despite these restrictions, the occupying army may exercise many rights commonly associated with ownership, including leasing out the property (the lease should not extend beyond the length of the occupation), harvesting crops, cutting timber (in reasonable amounts), and generally receiving the "fruits" of the public land.<sup>61</sup>

Some important exceptions should be noted. Property which belongs to local governments, or religious, educational or cultural institutions, is treated as private property and is

therefore subject to the restrictions on seizure or requisition of private property discussed below.<sup>62</sup> Cultural property, both real and personal, including religious, historical, scientific, and artistic property, is specially protected.<sup>63</sup> Even if such property contains raw materials of military value (e.g., the metals in a statue), it may not be confiscated, seized or requisitioned.<sup>64</sup>

#### **4. Public military property**

Public moveable property which is useful for military operations may be confiscated, and no compensation need be paid for it.<sup>65</sup> This category is generally interpreted broadly, and includes such items as cash, realizable securities, communications and transportation equipment, and the contents of arms depots.<sup>66</sup> Even wine vats have been included in this category.<sup>67</sup>

As broad as this category of public property susceptible to military use is, it is not unlimited. The primary exceptions are cultural property, as noted above,<sup>68</sup> and property that is privately owned, though held by the government.<sup>69</sup> Historically, violations of this aspect of the law have not been found in questions of fine judgment as to whether or not such property is militarily useful. Rather, violations have been found when there has been wholesale, indiscriminate plunder of public property, particularly works of art, without regard to its usefulness to military operations.<sup>70</sup> Consequently, a commander appropriating public moveable property for any reasonable military use (which probably does not include paintings to decorate an officers club) is likely to be operating well within permissible behavior under the law of war.

## **5. Private real property**

Private real property may not be confiscated or seized. Unlike public real property, such property may not be leased out, and the occupier is not entitled to its fruits.<sup>71</sup> This property, however, may be requisitioned for the use of the army of occupation.<sup>72</sup> There is scholarly authority for the position that temporary use of this property for billets, hospitals and similar purposes need not be compensated,<sup>73</sup> but this cannot be relied upon by U.S. commanders, as it is contrary to express U.S. policy.<sup>74</sup> U.S. commanders may requisition private real property in occupied areas, but they must be prepared to pay fair compensation for its use.

## **6. Private property capable of direct military use**

Private property that may be fairly characterized as "war material" may be seized. Seizure of private property differs from requisition of private property in important ways. The property can be seized for use outside the occupied area, not just for the needs of the occupying army.<sup>75</sup> Compensation need not be paid until the end of the war, and the party responsible for paying this compensation will be determined by the peace treaty. It need not necessarily be the occupier.<sup>76</sup>

Examples of war material include ammunition and arms, and means of transportation or communications.<sup>77</sup> The issue of appropriate treatment of raw materials is a difficult one. Although many raw materials are valuable, even essential, in modern warfare, they are often equally adapted to civilian use. This has resulted in opinions as to what constitutes "war material" that cannot easily be reconciled. Oppenheim, in his influential treatise, included cloth (for uniforms) and leather (for

boots) as examples of war materials.<sup>78</sup> On the other hand, the Court of Appeal, Singapore, has held that oil in the ground seized by Japanese forces was not "munitions de guerre" within the meaning of Article 53 of the Hague Regulations.<sup>79</sup> Thus, a commander should not rely on "seizure" in order to obtain raw materials. This would include the seizure of any items not capable of immediate military use, absent substantial modification.<sup>80</sup>

## **7. Other private property**

All other forms of private property may be requisitioned if such property is required for the needs of the occupation army or administrative personnel.<sup>81</sup> Only the needs of the local occupying force, not the general requirements of the occupying state's army, may be supplied by requisition, however.<sup>82</sup> Export of requisitioned material constitutes "economic plunder" and was the basis of several war crimes convictions following World War II.<sup>83</sup>

Requisition must be made under the authority of the local commander of the occupation forces and not individual soldiers.<sup>84</sup> The preferred method is systematic collection in bulk through local authorities.<sup>85</sup> This method has the advantage of apportioning the burden more fairly among the local inhabitants and limiting possibly acrimonious direct contact between the inhabitants and armed soldiers.<sup>86</sup> Coercive measures, if any, must be limited to those absolutely necessary to enforce the requisition.<sup>87</sup> Fair value must be paid for the property as soon as possible.<sup>88</sup> If prices cannot be agreed upon, they may be set by military authority.<sup>89</sup>

Funds to pay for requisitions may be obtained by "contribution," a special type of requisition for money. A

contribution by the civilian community may be ordered only by a commander-in-chief, not a local commander, and must be only to meet the needs of the occupying force.<sup>90</sup> To the extent possible, contributions should be collected in the same manner as are (or were) local taxes, and receipts must be provided.<sup>91</sup> An advantage of contribution is that it allows the burden of occupation to be apportioned among the local population as a whole, rather than among just those individuals who own materials required by the occupier. For example, the economic burden of providing foodstuffs needed by an occupying force will be shared by residents of urban neighborhoods, as well as those of rural areas.<sup>92</sup>

### **III. LAW OF WAR COMPLIANCE IS NOT ENOUGH: DOMESTIC LAW LIMITS ON COMBAT ACQUISITION.**

An initially legal requisition may become illegal through failure to make payment within a reasonable time.<sup>93</sup> This need for reasonably prompt payment raises the issue of the mechanisms which exist to pay property owners for requisition, especially if contribution is not used (or, as will be discussed later,<sup>94</sup> cannot be used). Under U.S. domestic law, payment from government funds for goods and services is controlled by contract law and fiscal law.<sup>95</sup> Both subjects merit a general review as well as a more detailed discussion of their application to contingency contracting.

## **A. Requirements of a valid contract**

The basic requirements of a valid contract are an agreement, or "meeting of the minds," based on legally sufficient consideration, between parties who have the legal capacity to form a contract.<sup>96</sup> Each of these basic requirements has particular problems in the contingency contracting environment.

### **1. Meeting of the minds**

"Meeting of the minds" can be difficult to achieve in contingency contracting, primarily due to differences in language and business practice. Interpreters can be difficult to locate. Procurement sections are seldom staffed with a translator, even at Corps level.<sup>97</sup> Even if a translator is available, one must be aware of subtle differences in the meaning attached to seemingly ordinary business terms. For example, American lumber "2-by-4's" are not really two inches deep by four inches wide, but one and one-half inches by three and one-half inches. Thus, if a contracting officer orders "2-by-4's" in Honduras, he will very likely receive precisely what he asked for -- two-inch by four-inch lumber -- and not what he actually wanted.<sup>98</sup>

### **2. Consideration -- benefit to both sides**

Sufficient consideration -- that each party derive some benefit from the bargain -- is not likely to be a particular problem in forming contingency contracts, as compared to other forms of government contracts. Most<sup>99</sup> contingency contracts will probably be relatively straight-forward exchanges of money for goods or services. The only readily-apparent potential

consideration problem is likely to arise in the area of contract administration, specifically, extensions of delivery time.

Other legal systems place far less emphasis on timely performance or delivery than does that of the U.S. On Grenada, Major Andrew Johnson, one of two contracting officers deployed to the island, developed a rule of thumb concerning delivery dates in the Caribbean: "Monday" really means "Wednesday."<sup>100</sup> Add to these cultural differences the disruptions of war, and it is likely that delivery dates will be missed. Under American government contracting rules, this is grounds to terminate the contract for default.<sup>101</sup> A contracting officer allowing a contractor to extend the delivery date is supposed to require consideration, such as a reduction in price or an increase in quantity or quality of goods delivered. In practice, however, contracting officers have some discretion in this area. If the delay is "excusable," that is, not the fault of the contractor, the contractor has a right to an extension of the delivery date. The extension granted, however, is to be only for that period of elapsed time directly related to the valid excuse. As this is a factual determination, the contracting officer does possess some flexibility in allowing additional time, without requiring additional consideration.

In his decision, the contracting officer should consider whether it is in the government's best interest to continue with the same contractor. This is usually a matter of whether the goods in issue can be gotten more quickly by continuing to do business with the first contractor or by initiating a new contract with another vendor. When the delay is simply the result of a cultural difference in the way business is done, flexibility on the part of the contracting officer is probably the best course of action.

### **3. Authority to bind the government**

#### **a. In General**

The final basic contracting requirement, capacity to make a contract, is strictly limited in government contracting. The capacity to bind the government encompasses much more than the common law requirements of sanity, sobriety, and attainment of legal age. The government cannot be held to a contract unless the person making it possesses the actual authority to act for the government in the specific area of contract formulation.<sup>102</sup>

"Actual authority" is a term of art which distinguishes such authority from "apparent authority." Under the common law, a principal may be bound to an unauthorized agreement made by its agent with a third party, if the principal gave that third party reason to believe the agent had contracting authority. The contracting authority of the agent in such cases is called "apparent authority" because the agent "appears" to have authority he does not actually possess. Apparent authority is legally insufficient to bind the government to a contract.<sup>103</sup>

Command authority, as broad as it is, does not necessarily include the authority to enter into contracts on behalf of the government. In fact, it rarely does include such authority. Contracting authority is vested in the heads of government agencies with contracting power, such as the Department of Defense and the Department of the Army.<sup>104</sup> This power may be delegated by creating subordinate "Contracting Activities." The person in charge of a Contracting Activity is called the "Head of Contracting Activity" (HCA). Contracting Activities have been established in DOD; examples include U.S. Army Material Command activities and major commands (MACOM's).<sup>105</sup>



MACOM commanders, as HCA's, are the lowest level at which a commander has contracting authority by virtue of holding a command position. Commanders at MACOM or higher levels typically do not exercise their contracting authority personally, but through a Principle Assistant Responsible for Contracting, or PARC.<sup>106</sup>

Contracting authority is delegated directly to individual contracting officers in subordinate commands, not commanders. The instrument used to delegate such authority is called a "Certificate of Appointment," or "warrant." A warrant is issued by the PARC,<sup>107</sup> and establishes the limits of a contracting officer's authority to enter into contracts. The contracting officer's authority may be limited as to the dollar value of individual contracts, type of contract, or any other limitations specifically indicated on the warrant.<sup>108</sup>

If a contracting officer exceeds the limits of his warrant, the action he has taken is invalid, unless ratified by a contracting officer with sufficient authority to do so.

This limitation of contracting authority solely to duly appointed contracting officers is not a recent development resulting from concerns over extraordinarily expensive hammers and toilet seats. The Supreme Court has held that the U.S. is not bound by unauthorized contractual actions since 1868,<sup>109</sup> when it refused to require payment of a commercial draft that had been guaranteed by the Secretary of War.

This limitation on contracting authority is not limited to the armed forces. The principal case concerning "actual" as opposed to "apparent" contracting authority involved the Federal Crop Insurance Corporation.<sup>110</sup> Other unauthorized contractual actions have been attempted, without success, by officials ranging from the Deputy Assistant Secretary of Labor for Labor

Relations<sup>111</sup> to the chief administrator of the National Capital Sesquicentennial Commission.<sup>112</sup>

The important thing to remember is that, absent a warrant, no authority exists to enter into a contract, and, without a contract, no authority exists to expend U.S. funds for goods and services.

b. Unauthorized commitments -- ratification or personal liability

When a contract is made, or an attempt is made to contract, without actual contracting authority, the government may choose to be bound by the contract. This is done by "ratification." The essence of ratification is the approval, by an individual with the requisite authority to do so, of a contract that is invalid solely because the person who made it lacked the authority to do so on behalf of the government.<sup>113</sup>

The military rules for ratification of "unauthorized commitments" are set forth in the Defense Federal Acquisition Regulation Supplement (DFARS) section 1.670. The prerequisites for ratification are

(1) that some benefit to the government must have resulted from the unauthorized commitment (goods or services must have actually been accepted by the government);

(2) that the ratifying official has the authority to approve such contracts and had the authority to do so at the time the commitment was made;

(3) that the contract would otherwise have been proper, if it had been made by someone with the authority to make it;

(4) that a contracting officer determine that the price is fair and reasonable, and recommend payment;

(5) that legal counsel agree with the contracting officer's recommendation to pay for the commitment;

(6) that funds were available at the time of the commitment and are still available; and

(7) that any additional regulations or procedures for ratification which are required by subordinate agencies (i.e., Army, Navy, etc.) are also followed.<sup>114</sup>

If the government, acting through the contracting officer, legal counsel and ratifying official, decides not to ratify the commitment in issue, the individual who made the contract may be personally liable for payment of the obligation incurred.<sup>115</sup> This principle dates to 1855, when the U.S. Attorney General opined that an individual who, without the authority to do so, attempts to obligate the government to a contract, may be personally responsible for any obligation incurred.<sup>116</sup> Although unauthorized commitments made in good faith are usually ratified, personal liability is a real possibility. The contracting officers on Grenada did refuse to ratify some commitments (primarily contracts for souvenir T-shirts allegedly purchased as PT uniforms).<sup>117</sup>

## **B. Fiscal Law Limits on Government Contracting**

Although a contracting officer may possess the authority to enter into a contract, a contract may not be made unless government funds are available to pay for it. These funds must be appropriated by Congress, or, as the Constitution states: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>118</sup>

## **1. The "anti-deficiency act"**

It is a criminal act to enter into or authorize government contracts in the absence of government funds to pay for such contracts. Known informally as a violation of the "anti-deficiency act," a knowing and willful violation of 31 U.S.C. § 1341(a) (or of 31 U.S.C. §§ 1342 or 1517(a)) is punishable by a fine of up to \$5000, 2 years in prison, or both.<sup>119</sup>

An exception worth noting at this point may be relevant to contingency contracting. The Army, Navy, and Air Force may spend money not yet appropriated to purchase needed clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies.<sup>120</sup> This exception is used primarily to sustain the armed forces during funding gaps which occur at the end of the fiscal year. It must not be construed as blanket authority to disregard funding limits when purchasing listed items.<sup>121</sup>

## **2. The Purpose Statute**

It is not legally sufficient that DOD, or the Army, or an individual command has government funds available. The "right kind of money" must be available to purchase the desired goods and services. The source of this requirement is the "purpose statute," 31 U.S.C. § 1301(a), which states: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

How may a commander or contracting officer determine whether suitable funds are available? At times this is a relatively easy process. If an item or project is specifically mentioned in an appropriations bill, it is clearly permissible to spend the funds so appropriated for such an item or project. A

purpose for which certain funds were appropriated may also be specifically mentioned in the legislative history.

Those situations, however, will rarely arise in contingency contracting. Items purchased on the local economy in the early stages of a deployment will rarely, if ever, appear as line items in an appropriations bill or be referenced in congressional hearings.<sup>122</sup> An exception of limited applicability, however, is that expenses of occupation administration are permanently authorized to be paid from Department of Defense appropriations.<sup>123</sup>

The General Accounting Office (GAO) has developed rules to judge the propriety of expenditures for items not specifically mentioned in appropriations. The item must be reasonably needed to accomplish an authorized purpose,<sup>124</sup> not otherwise prohibited by law,<sup>125</sup> and not provided for in another, more specific appropriation.<sup>126</sup>

Agencies have some discretion to determine those items reasonably necessary to accomplish their assigned and funded missions. For example, the Comptroller General approved the purchase of calendars with funds which were appropriated for chaplains' activities because those calendars were overprinted with chapel schedules.<sup>127</sup> Discretion is broadest when new duties are assigned after appropriations were made.<sup>128</sup>

This discretion is limited, however, by other provisions of law. Outright prohibitions or restrictions on spending money for particular items are obvious limitations. Some of these restrictions are general and permanent in nature. An example is the "bona fide needs statute,"<sup>129</sup> which requires spending a fiscal year's money only for a fiscal year's needs. Other restrictions are quite specific and are often contained in annual appropriations bills. Examples range from the prohibition of the use of Department of Defense funds for the Nicaraguan Contra

rebels<sup>130</sup> to the requirement that beer and wine for Department of Defense nonappropriated fund activities be purchased within the state where the installation is located.<sup>131</sup>

Unfortunately, short of deploying with a copy of the U.S. Code and a copy of the latest appropriations act, a commander or contracting officer can do little to be sure of avoiding all funding prohibitions. This is particularly true of officers who hold procurement as an alternate specialty, who are not in a procurement position, and who may be deployed on very short notice.<sup>132</sup>

That requirement of the "purpose test" that prohibits expending funds for items provided for in a more specific appropriation may also prove troublesome to unwary contracting officers.<sup>133</sup> Even if funds appropriated specifically for certain items are exhausted, the use of a more general appropriation, otherwise available for the purchase of such items, is prohibited.<sup>134</sup>

There are no criminal penalties for violating the "purpose statute." However, violations of the purpose statute may lead to violations of other fiscal laws that do carry criminal penalties.<sup>135</sup> The remedy for a violation of the purpose statute is the "deobligation" (return) of the funds that should not have been obligated and the obligation/expenditure of the funds that should have been utilized originally. By the time the error is corrected, however, sufficient money may not be available in the proper fund. If this is the case, a correction of the violation of the purpose statute will result in a violation of the anti-deficiency act.

### 3. Prohibition against augmentation

A corollary to the purpose statute's prohibition against obtaining funds from other appropriations is the prohibition, found in 31 U.S.C. § 3302, against obtaining funds from outside sources. The relevant portion is subparagraph (b):

Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.<sup>136</sup>

Certain statutory exceptions to this augmentation prohibition are relevant to contingency contracting. 10 U.S.C. § 2211 provides that any reimbursements received from members of the United Nations for certain expenses of joint exercises may be credited to DOD instead of being deposited in the Treasury. 22 U.S.C. § 1754 provides that proceeds of certain sales under the Mutual Security Act of 1951 may be used for enumerated purposes. Two of these purposes are the "purchase of goods or services in friendly nations"<sup>137</sup> and the "purchasing [of] materials for United States stockpiles."<sup>138</sup> The procedural aspects of utilizing such funds are beyond the scope of this thesis. A determination as to the availability of such funds must be made in coordination with the servicing comptroller.

Perhaps the most significant consequence, for purposes of this thesis, of the prohibition on augmentation is that it eliminates the availability of "contribution" under the law of war as a source of funding for occupation expenses.<sup>139</sup> Any contribution collected would become the property of the United States, not the Army, or the command occupying the territory. In the absence of any specific statutory authority to retain the

funds for local use, 31 U.S.C. § 3302 requires the immediate deposit of such funds in the Treasury. Permanent authority exists to pay for "expenses in connection with administration of occupied areas;" however, such expenses must be met out of Department of Defense appropriations, not general Treasury funds.<sup>140</sup> Thus, although contribution can be collected only for the use of the occupying force, once collected, such money must be deposited immediately in the Treasury, thus depriving the occupying force of the use of such funds.

#### **4. Prohibition against advanced payments**

A funding restriction which can cause particular difficulty for contingency contracting is contained in 31 U.S.C. § 3324. This provision forbids payment in excess of the value of goods already delivered, or services already performed. In other words, no advance payments may be made. This concept runs counter to normal business practice in many parts of the world where contingency contracting is likely to occur.<sup>141</sup> There are some exceptions which may prove to be invaluable, however. 10 U.S.C. § 2396 allows advance payments to be made in order to comply with foreign laws or regulations and advance payments of rent to be paid for a period dictated by "local custom." Where advance payments for items other than rent are dictated only by custom, however, the problem remains.

#### **5. "Doing Good" is no defense**

Commanders and contracting officers involved in contingency contracting should be aware that good intentions, and even good results, will not serve as a defense to violations of fiscal law. During a recent exercise in Honduras, funds appropriated for the



day to day operation of the Army (OMA funds) were used, among other things, to provide medical and veterinary services to civilians. This was not "a bad thing to do," as it surely contributed to local acceptance of the Army presence in the area. Nevertheless, the Comptroller General determined that such services should have been provided from Agency for International Development funds, not Army funds. The GAO decision directed that accounting corrections be made and that if these corrections resulted in a violation of the Anti-deficiency Act, the Army file the required report of an Anti-deficiency act violation with Congress.<sup>142</sup> Such stringent application of fiscal law is not novel. In 1868 the Secretary of War purported to guarantee the credit of a contractor in order to get much-needed supplies to starving soldiers in Utah. The U.S. Supreme Court found the Secretary had exceeded his authority and invalidated the instruments of that transaction.<sup>143</sup>

## **6. Prospects for change**

In the current political climate, any wholesale relaxation of fiscal law restrictions on the Department of Defense is unlikely. The memories of outrageously expensive toilet seats and stool caps do not engender a great amount of trust in the military contracting system. Additionally, a recent Newsweek poll reported that 43% of those polled favored "major cuts in defense spending" as the principal approach toward reducing the federal budget deficit.<sup>144</sup> Even in the event of declared war, statutory and regulatory relief has not always been prompt. In World War II, restrictions were substantially relaxed for overseas commanders, but not until 1944, literally years after the U.S. declaration of a state of war.<sup>145</sup>

On the other hand, Congress has been willing to grant relief in specific, limited problem areas. One of the most notable examples is Congressional reaction to the GAO opinion (on spending in Honduras) referenced earlier.<sup>146</sup> Less than four months after the Comptroller General determined that the Department of Defense required specific statutory authority to provide humanitarian aid and civic assistance in the context of overseas operations, such statutory authority was provided. The Stevens Amendment to the 1985 Department of Defense Appropriations Act authorized DOD to utilize Operation and Maintenance funds to pay for "incidental" humanitarian assistance and civic action undertaken in the context of JCS coordinated or directed exercises.<sup>147</sup> The Fiscal Year 1987 Department of Defense Authorization Act added a new chapter, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, to Title 10 of the United States Code. This authorizes DOD to provide humanitarian and civic assistance during authorized overseas operations and to fund such assistance from funds specifically appropriated for that purpose.<sup>148</sup> This chapter also provides to DOD the authority to spend Operation and Maintenance funds for "minimal" humanitarian and civic assistance undertaken during overseas operations.<sup>149</sup>

Another example of Congressional willingness to correct specific fiscal law problems is that body's grant of authority to DOD to reallocate funds to avoid anti-deficiency act violations caused solely by currency fluctuations.<sup>150</sup>

It is clear that commanders and contracting officers involved in overseas deployments must comply with all normal fiscal law rules. When specific problem areas are identified, however, these issues should be surfaced and corrective legislative action taken.

### **C. Additional restrictions on specific types of acquisition**

In addition to those restrictions pertaining to all contract actions, there exist numerous restrictions applicable to specific types of contracts. It is beyond the scope of this thesis to focus in detail on real estate acquisition or the intricacies of the Federal Acquisition Regulation (FAR). Sufficient information will be provided, however, to point out the problems involved and to identify sources that will provide guidance and further information.

#### **1. Real estate**

Responsibility for real estate transactions rests with the Corps of Engineers (COE).<sup>151</sup> This issue may not initially appear to be related to contingency contracting. Rarely, if ever, will armed forces buy real estate or establish long-term leases in the early stages of a combat deployment. Short-term contracts for hotels and furnished rooms are considered service contracts, and therefore may be handled by non-COE contracting officers.

Only COE may negotiate retroactive leases, however.<sup>152</sup> Thus, if soldiers are sheltered in homes, hovels or hotels without a formal contract, owners of these facilities may not be paid rent until a COE team arrives on the scene.<sup>153</sup> In Grenada, while the contracting officers arrived in the early days of November,<sup>154</sup> the District Engineer Contracting Office team from Mobile, Alabama, was not on site until 21 November 1983.<sup>155</sup> Between 21 and 28 November, the team negotiated and executed 24 leases, and ratified a number of "leases" made by purchasing agents. A second trip to Grenada on 12 December 1983 was needed to clear up 13 additional leases.<sup>156</sup>

## **2. Purchases over \$25,000**

The requirements of the Federal Acquisition Regulation (FAR), Defense FAR Supplement (DFARS), and Army FAR Supplement (AFARS) are not suspended for contingency contracting.<sup>157</sup> These regulations are lengthy and filled with complex and time-consuming requirements, particularly with respect to purchases over \$25,000.<sup>158</sup>

### **a. Competition in Contracting Act**

Much of the complexity of these regulations flows from the competition requirements of the Competition in Contracting Act of 1984 (CICA).<sup>159</sup> The purpose of competition is more than ensuring that the government "gets a good deal." The "full and open competition" required by CICA mandates also that all responsible<sup>160</sup> contractors must be given a fair chance to compete for a contract.<sup>161</sup> The minimum requirements of full and open competition are to have specifications that are not unduly restrictive,<sup>162</sup> to provide adequate notice of the proposed contract,<sup>163</sup> to allow a minimum of 30 days for potential contractors to prepare their offers, and to evaluate those offers fairly.<sup>164</sup>

This full and open competition is to be achieved through contracting using competitive procedures, the most important of which are sealed bidding<sup>165</sup> and competitive proposals.<sup>166</sup>

### **b. Choice of Sealed Bidding or other Competitive Procedures**

Sealed bidding must be used if four criteria are present and may not be used if any of these criteria are absent:

(1) sufficient time must be available to complete the sealed bidding process (as will be discussed, the time required can be substantial);

(2) price will be the determining factor in selecting a contractor;

(3) discussions with the bidders are not needed; and

(4) the contracting officer reasonably expects to receive more than one bid.<sup>167</sup>

If a contracting officer chooses not to use sealed bidding, he or she must document the reasons as to why this process is not appropriate.<sup>168</sup>

### c. Sealed Bidding

The solicitation for offers from potential contractors under sealed bidding procedures is called an Invitation for Bids (IFB). The rules for this method of procurement are contained in part 14 of the FAR.<sup>169</sup>

### Publication requirements

At least 15 days prior to issuing an IFB, the proposed procurement must be publicized in the Commerce Business Daily (CBD).<sup>170</sup> Individuals interested in contracting to provide the government particular goods or services may inspect the appropriate classification in the CBD to determine which government agencies are currently looking for that particular product or service. A notice must also be placed on the public bulletin board of a contracting office planning to contract for goods or services, in order that local contractors might be advised of business opportunities.<sup>171</sup>

IFB's must be sent to those who request them (for example, after seeing the CBD notice)<sup>172</sup> and to bidders on a "bidder's list" comprised of prior bidders for similar items and others who have asked to be included on the list.<sup>173</sup>

### Contents of an IFB

The IFB contains specifications for the desired item and applicable contract and solicitation clauses. Even a relatively simple IFB can consist of 30 to 40 pages, even though many or most required clauses are incorporated by reference to the FAR or a Supplement. The bid schedule lists the items desired, with a space or spaces for the bidder to fill in the price at which he will sell the item. The bidder then returns the completed bid schedule and a completed copy of the "representations" portion of the IFB. This is a multi-page section in which the bidder provides information, for example, as to whether it is a corporation or sole proprietor. The bidder must state that it is not prohibited from contracting with the government (not "debarred" or suspended), that it is or is not a small business, is or is not on the Environmental Protection Agency's list of polluters, and provide various other items of information which the government may use to foster socioeconomic policies through government contracting.

### Awarding the contract -- sealed bidding procedure.

The IFB will specify a date and time for the opening of bids, and any bid not received on time may not be considered.<sup>174</sup> When the specified time arrives, the contracting officer opens the bids and determines which offers the lowest price. The bidder submitting this bid is the "apparent low bidder"; however, prior

to awarding the contract, the contracting officer must make additional determinations. The apparent low bidder will become the contractor only if it is "responsible" and its bid is "responsive."

Responsibility, in a potential contractor, is a question of the contractor's ability to perform the contract. Does it have enough financial backing? Does it have any experience in the area? Does it have the facilities and equipment? Before awarding the contract, the contracting officer must decide that the potential contractor is responsible.<sup>175</sup>

Responsiveness must also be considered. To be accepted, bids must not attempt to modify the IFB in regard to price, quantity, quality or delivery.<sup>176</sup> Any bid which modifies these items, or is ambiguous as to whether the bidder actually agrees to meet the government's requirements, is nonresponsive. A nonresponsive bid may not be accepted, even if it would be to the government's advantage to do so.<sup>177</sup>

The responsive and responsible bidder offering the lowest price will be awarded the contract.

#### d. Competitive proposals

The other principal method of competitive procedures is competitive proposals, also known as "negotiation." The rules for this method of procurement are contained in FAR Part 15. Negotiated procurements have the same publicity requirements applicable to sealed bidding.<sup>178</sup> Two types of solicitations are used in negotiated contracting, Request for Proposals (RFP) and Request for Quotations (RFQ). Since RFQ's are principally used under small purchase procedures, they will be discussed in a later section.

### Contents of an RFP

A request for proposals will contain applicable contract and solicitation clauses<sup>179</sup> and a description of the product or service desired. This description is not like an IFB specification which bidders must agree to meet exactly, without any variations or ambiguities, or else have their bids rejected as "nonresponsive." Instead, potential contractors, or "offerors," in negotiated procurements will offer detailed proposals indicating the manner in which they will be able to better satisfy the government's requirements. Moreover, unlike the IFB, price is not the deciding factor and might not be the primary consideration. Accordingly, the most important portion of the RFP is the statement of "evaluation criteria." This advises offerors of the manner in which the government will decide between competing proposals. Thus, the evaluation criteria detail not only what factors are important, but also the relative importance of these factors. These criteria may set forth any conditions rationally related to the government's needs, but may not be unduly restrictive.<sup>180</sup> For example, proficiency in Spanish and prior experience as a translator may be more important than price in selecting a Spanish-language interpreter.

### Awarding the contract -- competitive proposals procedure

The contract is to be awarded to the offeror whose proposal best satisfies the evaluation criteria. At times, it is possible to award the contract on the basis of the initial proposals, if these proposals meet the government's minimum needs and the prices are fair and reasonable.<sup>181</sup> Frequently, however, the contracting officer must conduct discussions with offerors in order to obtain the desired goods or services. These



discussions clarify ambiguities in a proposal, resolve any questions of responsibility, or correct "deficiencies." Deficiencies are differences between the proposal and the government requirement or a price that is out of line with the government's estimate or the other bids. For example, a contract to provide hotel rooms for 30 people may specify fifteen double rooms with bath, located in a single building. One offeror may quote a good price for housing 30 people, but be ambiguous as to whether that price is for 15 double rooms or for 8 four-person rooms. Another may clearly offer 15 double rooms, but with shared shower facilities. A third offeror may propose 15 double rooms with private baths, but located in 3 different hotels. The contracting officer would hold discussions with the first offeror to clarify the number of rooms offered, with the second to determine whether he has any rooms that do have private showers, and with the third to determine if he could reallocate room assignments to get everyone in one building.

If discussions are held with any offeror, they must be held with all offerors who have a reasonable chance of being awarded the contract.<sup>182</sup> In the example above, the contracting officer may not call the first offeror to "see if they really meant 15 rooms" unless he also provides the other offerors with a chance to revise their proposals. If the contracting officer modifies or supplements any of the evaluation criteria (e.g., decides that four people could share a room) he must give notice of that change to all offerors with a reasonable chance of receiving the award.<sup>183</sup>

After discussions, a date is set for submission of best and final offers (BAFO's). Any late BAFO's may not be considered. The offeror whose timely BAFO best meets the government's needs is to be awarded the contract.<sup>184</sup>

e. Specifications may not be "unduly restrictive"

In all types of competitive procedures, the government's specifications or evaluation criteria must not be unduly restrictive. "IBM-compatible" computers may be required if such compatibility is essential for use with existing equipment. However, a requirement for IBM computers may not be made by either specifying this brand name or an unneeded feature found only on IBM computers.<sup>185</sup>

f. Exceptions to Competition Requirements

Sealed bidding is unlikely to ever be used in a contingency setting. It simply takes too much time to prepare detailed specifications, publicize the IFB, and provide contractors with time to examine the specifications and prepare a bid.<sup>186</sup> As the use of competitive proposals is required when time is too short for sealed bidding,<sup>187</sup> contingency contracts will thus almost always be negotiated contracts. However, meeting even the requirements of competitive proposals may be impracticable during deployments to areas other than those with an established procurement base, such as that found in Europe and Korea.<sup>188</sup> For an example of the lead time involved, the 193d Infantry Brigade (Panama) contracting office requires four months lead time before an exercise for all requests for commercial contracts over \$25,000.<sup>189</sup>

Exceptions to CICA's competition requirements are permitted under strictly limited circumstances listed in the statute and FAR 6.302. Three of those exceptions are relevant to a discussion of contingency contracting: exception (2) for unusual and compelling urgency, exception (4) for international agreements, and exception (6) for national security.<sup>190</sup>

Unusual and compelling urgency

(c) The head of an agency may use procedures other than competitive procedures only when -

...

(2) The agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;<sup>191</sup>

The "unusual and compelling urgency" provision will be the most utilized exception in contingency contracting. DFARS allows use of this exception if the purchase request has a very high priority, defined as Uniform Material Movement and Issue Priority System (UMMIPS) categories 01 through 04.<sup>192</sup> To avoid wholesale abuse of the UMMIPS system, however, such purchase requests must be approved prior to submission to the contracting officer.<sup>193</sup> The draft DA Pamphlet on Contingency Contracting recommends that logistics staff officers (G-4 or S-4) validate these purchase requests.<sup>194</sup>

This exception may not be used if the "urgency" is the result of a failure to plan ahead.<sup>195</sup> However, for urgent requirements that surface because of a sudden deployment, it provides an escape from strict compliance with the normal time-consuming competition requirements. It is also the only exception to the competition requirement that does not require advance Justification and Approval (J&A).<sup>196</sup> This can be a very significant saving of time, particularly if contract messages to the appropriate approval levels are receiving a low priority.<sup>197</sup>

### International Agreement

(c) The head of an agency may use procedures other than competitive procedures only when -

...

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;<sup>198</sup>

This provision is unlikely to be useful in many contingency situations outside Europe and Korea. Only if a Status of Forces Agreement or treaty exists prior to deployment, and it specifies use of a source which is still available under the contingency conditions, will this be of any benefit.

### National Security

(c) The head of an agency may use procedures other than competitive procedures only when -

...

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;<sup>199</sup>

This exception provides for contracting without the normal competition (especially publication) requirements when it is

necessary to keep the contracting action confidential (e.g., in preparation for a surprise deployment). The designation of the purchase as "classified," or the purchase of a classified item is not in itself sufficient justification to use this provision.<sup>200</sup>

g. Justifications and Approvals (J&A)

In order to use any of the competition requirements exceptions, the contracting officer must offer a written justification and have it approved at an appropriate level (levels of approval are discussed in the next section). J&A's based on exception (2), unusual and compelling urgency, may be submitted after the fact, but they are still required.<sup>201</sup>

The contracting officer's justification must include

- (1) a description of the item or service required,
- (2) identification of the relevant statutory exception (e.g., "10 U.S.C. § 2304(c)(6)"), and the reasons for using it,
- (3) a determination that the anticipated price will be fair and reasonable (often difficult in a contingency situation),<sup>202</sup>
- (4) a description of any market survey done (to locate sources or determine prices) or an explanation of why none was conducted,
- (5) a list of sources, if any, that showed an interest, in writing, in competing for the contract, and
- (6) a statement of how the agency can, if possible, avoid using noncompetitive procedures the next time it needs the same item or service.<sup>203</sup>

The process is obviously designed to discourage unnecessary use of exceptions to the competition requirement. However, such a process also makes legitimate use more difficult for the deployed contracting officer.

### J&A Approval Levels

The amount of the proposed contract is the factor utilized in determining who may approve the justification for limiting competition. Up to and including \$100,000, approval may be given "at a level above the contracting officer." Over \$100,000, but not one million dollars, the approval must be provided by a Competition Advocate. When higher dollar amounts are involved, approval must be granted at HCA (e.g., MACOM) level or higher.<sup>204</sup> In the case of deployed contracting officers, even the "level above the contracting officer" may well be in the United States. This may result all exceptions requiring approvals in advance (everything other than exception (2)) being unworkable if communication proves to be difficult.

#### h. Maximum practicable competition.

Even when an exception is approved, a contracting officer must still obtain as much competition as is "practicable in the circumstances."<sup>205</sup> Very little guidance exists as to the meaning of the requirement. Small purchase procedures call for competition to the "maximum extent practicable,"<sup>206</sup> and the FAR indicates that standard is generally satisfied by verbal price quotes from 3 or more vendors.<sup>207</sup> That guidance, however, is much more applicable to the small purchase specialist in CONUS who has available to him a good telephone system and the "yellow pages." The competition required to be obtained by a deployed contracting officer will depend on the facilities and information actually available. At a minimum, however, a contracting officer aware of two equally willing and qualified sources may not arbitrarily exclude one. In other words, even when possessed of a J&A permitting noncompetitive procurement,

a contracting officer must still "play fair" with potential contractors.

i. Oral solicitations

A solicitation need not be written when a contracting officer is making a small purchase (discussed later), purchasing perishables, or is acting in an emergency.<sup>208</sup> A high UMMIPS priority<sup>209</sup> does not, standing alone, constitute an emergency.<sup>210</sup> The contracting officer must still document the file in order to show why an oral solicitation was used and list the sources contacted (including name, date and time, and price quoted).<sup>211</sup>

Once a contractor is selected, the oral agreement must be expeditiously reduced to a written contract. Any delay in doing so must be explained in the contract file.<sup>212</sup> Unjustified delay tends to make the original "emergency" suspect.

i. Deviations from Acquisition Regulations.

The FAR also contains provisions concerning "deviations" from its rules. These appear in FAR Subpart 1.4. Innovation is encouraged in section 1.402, "Policy," which states that "...development and testing of new techniques ... should not be stifled simply because such action would require a FAR deviation." Despite these encouraging words, however, the actual process is daunting. Even if the deviation affects just one contract, it must be approved by an agency head (e.g., the Secretary of the Army) or his designee.<sup>213</sup> If the deviation is from a rule contained only in the AFARS, and not in the DFARS or FAR, an HCA or PARC is authorized to approve deviations from that rule.<sup>214</sup>

Deviations which affect more than one contract are called "class deviations." Class deviations from the FAR for DOD actions must receive advance approval from the Deputy Undersecretary of Defense, Research and Engineering (Acquisition Management), and a copy must be furnished to the FAR Secretariat.<sup>215</sup> Class deviations from DFARS must be approved in advance by the Assistant Secretary of Defense (Acquisition and Logistics) or by unanimous agreement of the members of the DAR Council.<sup>216</sup> AFARS class deviations require advance approval by the Director of Contracting at Department of the Army level.<sup>217</sup> If an agency expects a class deviation to be required permanently, the agency is expected to propose a FAR revision.<sup>218</sup> Permanent FAR revisions must be approved by the FAR council, and this will very likely require an extended period of time.

This is not to say that deviations will never be a factor in contingency contracting. One exception to the requirement for prior approval which may be applicable to contingency contracting is found in FAR 1.405, which authorizes deviation from the FAR when required to comply with treaties or executive agreements.<sup>219</sup> Decisions regarding any other deviations necessary should be made, and deviations requested, well in advance of actual deployment. Moreover, it should be noted that, as class deviations generally expire after two years,<sup>220</sup> deviations obtained well in advance of deployment may expire before they are required. Accordingly, those deviations expected to be required in deployment situations should either be recommended as permanent revisions to the FAR or prepared and held for submission to the appropriate authority when this necessity arises.<sup>221</sup>



### **3. Small purchases**

The requirements of acquisition regulations are substantially relaxed for purchases up to and including \$25,000. Congress has recognized that the complexity involved in complying with the full range of procurement rules would be impractical in the case of small purchases. In order to lessen the burden for both contracting agencies and contractors, Congress mandated use of simplified procedures for "small purchases" (defined as \$25,000 or less) of property or services.<sup>222</sup> To avoid opening an obvious loophole, however, Congress has also specified that purchases may not be artificially split into several smaller purchases in order to qualify for the simplified procedures.<sup>223</sup>

Competition is still required, but only to "the maximum extent practicable."<sup>224</sup> In practice, this is far less than the "full and open competition" required for large purchases. For example, small purchases need not be synopsized in the Commerce Business Daily.<sup>225</sup> Notice of purchases between \$5000 and \$25,000 must be posted in a public place at the contracting office for 10 days, but the purchase need not be delayed to allow for this period of time.<sup>226</sup> Obtaining verbal or telephonic price quotes from 3 or more vendors is generally considered sufficient competition for a small purchase.<sup>227</sup>

Purchases under \$1000 may be made without obtaining any competitive price quotes, if the contracting officer is able to determine that the price quoted is reasonable.<sup>228</sup> Making a determination concerning "reasonableness" may well be a difficult task for contracting officers deployed to unfamiliar areas. Sources which have helped exercise contracting officers ascertain fair local prices include local Corps of Engineers personnel, the local U.S. Military Assistance Group, or the U.S.

Embassy contracting office.<sup>229</sup> One or more of these sources, if available, should prove to be of great assistance during deployment situations.

Price information may be requested from vendors orally or by using DD Form 1155, Order for Supplies or Services/Request for Quotations.<sup>230</sup> Prices quoted are not to be considered "offers." That is, the government may not form a binding contract by making an order at the quoted price. Instead, the government's order to the vendor becomes an offer to buy at that price, which the vendor accepts by so notifying the government or by delivering the items requested.<sup>231</sup> Thus, as the government's order is only an offer, it may be withdrawn or changed unilaterally by the government at any time prior to the contractor accepting the order.<sup>232</sup>

#### a. Procedures for Small Purchases

There are three principal types of simplified small purchase procedures: Blanket purchase agreements, imprest funds, and purchase orders.

##### Blanket purchase agreements

A blanket purchase agreement (BPA) is the government-contracting equivalent of a charge account. It is an agreement by the vendor to provide items from a broad class, such as "hardware," at a price at least as low as the price provided the vendor's most favored customer for comparable orders. Authorized purchasers, and the dollar limit for each, will be listed in the agreement. The authorized purchasers are appointed by the contracting officer.<sup>233</sup>

A BPA may be used to avoid issuing numerous purchase documents for repetitive small purchases from a single supplier. It does not waive the small purchase competition requirements, and purchases should not be made against a BPA without examining competing prices. The BPA is designed for use in those situations in which past experience has shown that a supplier is dependable and has consistently offered a lower price. More than one BPA may be established for a class of items if experience has shown that more than one supplier is dependable and has low prices.<sup>234</sup> The lack of past experience will make BPA's difficult to utilize in the early stages of a deployment, unless historical data associated with prior deployments to the area is available.<sup>235</sup>

### Imprest funds

An imprest fund is the government-contracting equivalent of a "petty cash" fund. The rules for imprest funds are set forth in subparts 13.4 of the FAR and its Supplements and in Army Regulation 37-103-1.<sup>236</sup> An "imprest fund cashier," who may be appointed by the local commander, may pay up to \$500 for small purchases.<sup>237</sup> Combined with ordering officers<sup>238</sup> appointed under AFARS 1.698 to make such small purchases, this can be a "force multiplier" for contracting officers. Accordingly, items costing under \$500 required by isolated units may be ordered and paid for locally without the involvement of the contracting office or the finance office.

Detailed instructions for operation of an imprest fund are contained in DFARS 13.405, "Procedures," and in a Contingency Contracting pamphlet currently in draft form.<sup>239</sup>

A significant limitation on the use of imprest funds is that, regardless of the shortage of personnel, the same individual may

not serve as both the imprest fund cashier and ordering officer.<sup>240</sup> The opportunity for fraud is simply considered to be too great.

### Purchase Orders

Two forms of purchase orders are available for use. DD Form 1155, Order for Supplies or Services/Request for Quotations, is used within DOD for purchases involving an amount of money within the small purchase limit (\$25,000). Standard Form 44, Purchase Order - Invoice - Voucher (SF44),<sup>241</sup> is limited to use for purchases up to \$2500.<sup>242</sup> Copies of these forms are contained in Appendix A.

### *DD Form 1155*

The DD Form 1155 and its companion form, DD Form 1155r-1, Reverse of Order for Supplies or Services/Request for Quotations - Foreign,<sup>243</sup> provide a convenient means by which to prepare small purchase contracts. Almost all required clauses are printed on the form, which may be completed by hand.<sup>244</sup> The form can be used to make the order, record the delivery, and serve as the public voucher to authorize payment.<sup>245</sup> Detailed instructions for completing DD Form 1155 are contained at DFARS 13.505-70, and additional instructions specifically tailored to deployment conditions are contained in the draft Contingency Contracting pamphlet.<sup>246</sup> DD Forms 1155 were used extensively in Grenada.<sup>247</sup>

### *Standard Form 44 (SF 44)*

The FAR describes the SF 44 as

a pocket-sized purchase order designed primarily for on-the-spot over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated activities. It is a multipurpose form that can be used as a purchase order, receiving report, invoice, and public voucher.<sup>248</sup>

The SF 44 differs from DD Form 1155 in that it includes instructions concerning its use, rather than incorporating specific contract clauses. It allows ordering officers at isolated locations to make one-time, over-the-counter purchases of goods and services that are immediately available. As the funding limit for use of the SF 44 is five times that amount authorized for imprest fund purchases, use of the SF 44 greatly expands the number of purchases for which ordering officers can be used.

#### b. Ordering Officers

Given the limited number of deployable contracting officers,<sup>249</sup> the ability to use ordering officers is crucial. Ordering officers may be appointed to perform several functions;<sup>250</sup> however, the most useful of these functions in contingency contracting will be that of making purchases using imprest funds or SFs 44. Ordering officers may be appointed by the same officials who appoint contracting officers, and by chiefs of contracting offices, if these individuals are delegated such authority by the HCA.<sup>251</sup>

Contracting officers in Grenada found ordering officers to be so indispensable that they appointed such officers despite their lack of authority to make such appointments.<sup>252</sup> Given the likelihood of poor communications to CONUS in the early stages

of a deployment,<sup>253</sup> the authority to appoint ordering officers should be routinely delegated to deployment contracting officers.<sup>254</sup>

c. Staying within the small purchase limits

Small purchase procedures are much simpler than "normal" contracting procedures. Accordingly, such procedures should be used to the fullest extent possible in contingency contracting. Simplified procedures both speed up the process and lessen the workload for scarce contracting personnel. Consequently, a contingency contracting officer should be fairly aggressive in seeking ways to structure transactions in such ways as to stay within the small purchase dollar limits. Note, however, that this must not include splitting larger transactions into \$25,000 increments. Such transaction splitting is specifically prohibited by statute.<sup>255</sup>

There are, nevertheless, perfectly legitimate ways to achieve maximum use of small purchase procedures. At the risk of stating the obvious, it should be noted that renting is generally cheaper than buying. Even in Grenada, three commercial rental car companies were available to lease vehicles.<sup>256</sup>

A less obvious use of small purchase procedures is contracting for small amounts during the period it takes to arrange the large purchase. Even when possessed of approved exceptions from normal competition requirements, it still requires time to arrange large purchases. The contractor will necessarily require some time to react to requests, and ship the desired items. In Grenada, a contract for petroleum, oil and lubricants (POL) was negotiated quickly and awarded to Texaco International, with invoices sent directly to Ft. Bragg. During that period of time between deployment to Grenada and the

beginning of actual deliveries by Texaco, however, POL was purchased from local gas stations through the use of SFs 44.<sup>257</sup>

#### **IV. RECOMMENDATIONS TO COMMANDERS AND THEIR LEGAL ADVISORS**

There are planning steps which commanders can take to make maximum use of contingency contracting under existing laws and regulations. Before turning to a discussion of those steps, however, a more explicit discussion of the reasons for choosing contracting over seizure or requisition is appropriate.

##### **A. Plan to Avoid Seizure and Requisition**

Commanders should avoid use of seizure and requisition to the fullest extent possible. Use of captured enemy property does not pose a problem; however, forcible acquisition of private property will very likely have a negative impact on the given mission. An issue of the Marine Corps Development and Education Command's Operational Overview which was devoted to the Grenada operation states succinctly:

If the civilians in the area are friendly, they may begin to feel differently if you take their car or truck at gunpoint. It doesn't hurt to ask. Of course, any enemy military transport is "fair game."<sup>258</sup>

The Marines attribute part of their success in Grenada to civilian assistance and view this assistance as resulting, at least in part, from their respect for private property.<sup>259</sup>

Early on in American history, George Washington also dealt with the sensitive issue of the requisition of private property,

and expressed, in his military journal, the disadvantages of utilizing "military impress":

Instead of having magazines filled with provisions, we have a scanty pittance scattered here and there in the different States. Instead of having our arsenals well supplied with military stores, they are poorly provided, and the workmen all leaving them.... Instead of having a regular system of transportation upon credit, or funds in the quartermaster's hands to defray the contingent expenses of it, we have neither the one nor the other; and all that business, or a great part of it, being done by military impress, we are daily and hourly oppressing the people -- souring their tempers and alienating their affection.<sup>260</sup>

#### **1. Seizure or requisition is particularly unsuited to LIC**

The need to avoid "bayonet requisition" is especially important in low-intensity conflict (LIC). It rarely will be legally justified. Seizure and requisition are actions suited to the conventional battlefield and to hostile occupation.<sup>261</sup> In LIC, U.S. forces will most likely be functioning in support of a friendly government.<sup>262</sup> Accordingly, there will be no "occupied territory." Further, if the conflict is effectively dealt with in its earliest stages, there will be no conventional "battlefield."

In the LIC environment, respect for private property will be a vital part of either revolutionary or counter-revolutionary strategy. A principal reason for French defeat in Vietnam was the fact that the Vietminh respected private property. The Vietminh general, Giap, asserted, "Our army ... has always observed a correct attitude in its relations with the people. It has never done injury to their property, not even a needle or a



bit of thread." <sup>263</sup> French officers confirmed that this was more than just propaganda, that Vietminh soldiers were actually expected to adhere to this standard.<sup>264</sup> An American Army officer, commenting on the Vietminh code in 1966, stated, "Such actions win rather than alienate the people. They are just as important as the more conventional military operations."<sup>265</sup>

Local contracting has been recognized as a source of good will, encouraging local businesses and aiding the economy.<sup>266</sup> As beneficial as contracting is, it is only one part of what a comprehensive counter-insurgency strategy should be.<sup>267</sup> Used as part of a comprehensive program, however, it is one more way to fulfill the aim of counter-insurgency: "... to give the people a vested interest in the existing administration of the state: in Templer's words, to influence their 'hearts and minds.'"<sup>268</sup>

## **2. Accounting and accountability problems of seizure and requisition**

Seizure and requisition should also be avoided in view of the accounting and accountability problems involved. The claims office on Grenada received over 50 claims for alleged vehicle damage resulting from unauthorized use of private vehicles by U.S. soldiers.<sup>269</sup> The claimants generally had no receipts, and there existed no American records documenting seizures or the condition of the vehicles at the time they were seized. As a result, claims personnel were convinced, "... claims were undoubtedly paid for damage not done by U.S. soldiers."<sup>270</sup>

The lack of relevant records also contributed to the difficulty encountered in ensuring that all seized civilian vehicles were returned to the impound lot established at Point Salines.<sup>271</sup> Lack of accountability may also have resulted in unnecessary

damage being done to the vehicles. Often, this damage was so extensive that many of the vehicle owners did not wish to have their cars returned.<sup>272</sup>

### **3. How does the owner of seized or requisitioned property get paid?**

The Law of War requires that fair compensation be paid to the owners of private property seized or requisitioned.<sup>273</sup> No mechanism, however, exists under U.S. domestic law by which to pay for seizures and requisitions as such, and any payment from U.S. funds, for any reason, must be authorized by law.<sup>274</sup> Claims procedures do not provide a means to pay for seizures and requisitions.<sup>275</sup> In Grenada several claims were submitted for goods or services provided to U.S. forces.<sup>276</sup> All such claims were directed to the Comptroller, who had assumed control of contracting functions,<sup>277</sup> as they were not payable from claims funds.<sup>278</sup>

The only means by which the U.S. may pay for the seizure or requisition of private property is to treat such requisitions or seizures as contracts, albeit "unauthorized" contracts. These contracts must then be ratified through contracting and command channels,<sup>279</sup> often an extended and difficult process. As expressed in the USAREUR Battle Book for Contracting: "The ratification process for an irregular procurement consumes extensive manhours and involves commanders at all levels."<sup>280</sup>

If seizure and requisition are used, a commander will more than pay back any contracting time saved in additional time spent on contract ratification.<sup>281</sup> Moreover, the involvement of a contracting officer is still required in order to "transform" the irregular transaction into a contract. Only in this way may public funds be used to pay for the items seized or requisitioned.

In this regard, remember that, as earlier noted, a failure to afford adequate and timely compensation for seized or requisitioned property may be viewed as a violation of international law.<sup>282</sup>

**B. More combat-deployable contracting officers are needed**

One of the contracting problems evidenced in Grenada and in recent exercises in Honduras is the lack of trained, deployable contracting officers.<sup>283</sup> Although the Army has a procurement specialty, SC97, the vast majority of contracting officers are civilians.<sup>284</sup> Moreover, there are very few procurement non-commissioned officers.<sup>285</sup> While the XVIII Airborne Corps has acted to add deployable contracting officers to its TOE as a result of its experience in Grenada, the number of such individuals is still very small.<sup>286</sup>

The training and utilization of SC97 officers is heavily weighted toward major weapons system procurement.<sup>287</sup> Such experience is of little direct value in deployment (combat) contracting. As one member of the Army Procurement Research Office has stated, "We won't be buying tanks at the next Grenada, we'll be buying fresh bananas."<sup>288</sup> One of the two contracting officers first deployed to Grenada had just completed basic procurement schooling one month prior to deployment. He recalls that very little of this schooling was directly applicable to the situation in which he suddenly found himself.<sup>289</sup>

The true experts in the types of procurement most likely to be required in deployment situations are the small purchase specialists at posts, camps and stations. These personnel are almost exclusively nondeployable civilians, however. For those contracting officers who are deployable, Lieutenant Colonel Frank

L. Powell III (who was deployed to Honduras as a contracting officer with 5 days notice) has offered the following advice: "You should review small purchase procedures in detail if you have never had experience in this area."<sup>290</sup>

### **1. Trained ordering officers are needed**

Ordering officers serve as the force multiplier for contracting officers. As noted earlier, these individuals may make small purchases with imprest funds and SFs 44. The dollar amounts involved are small, but many of the items required during deployments may be acquired using these procedures,<sup>291</sup> and the dollar limits might be raised. (Representatives of the armed services at a JCS planning conference in January 1988 agreed that SF44 limits needed to be higher.<sup>292</sup>)

Obviously, ordering officers must be well trained. A contracting officer present in Grenada has estimated that approximately \$100,000 in irregular procurements were made by ordering officers under his technical supervision on Grenada, mostly "just stupid mistakes."<sup>293</sup> Much of the problem, he states, was that the ordering officers, lieutenants, would receive command pressure "to do something." And -- they would, right or wrong.<sup>294</sup>

Training for potential ordering officers is available. The Army Logistics Management College at Ft. Lee offers a short course for such individuals. Not all potential ordering officers will receive the opportunity to attend this course, however.<sup>295</sup> To provide training in this area, ordering problems could be worked into routine training exercises in CONUS. While Army policy discourages excessive appointment of ordering officers,<sup>296</sup> the benefits derived from having trained ordering officers

available for overseas deployments certainly justify prior on-the-job training. In those situations in which on-the-job training cannot be provided in the context of CONUS exercises, beneficial experience can be gained through work in the small purchase section of the local procurement office.<sup>297</sup>

## **2. Do not underestimate the importance of logistics**

Some commanders may object to any diversion of assets from "tactical" training. Indeed, there is a general concern with "tooth to tail" ratio<sup>298</sup> that tends to obscure the vital importance of the logistics "tail." No matter how well-trained, however, no matter how high their morale, soldiers require materiel in order to fight:

Even a battalion of eight hundred men will typically be spread out over several square miles in modern war, and the enormous rates of consumption of fuel, ammunition, and other stores mean that organizing supplies becomes a critical factor.<sup>299</sup>

No less a tactical authority than General Douglas MacArthur noted, "The history of war proves that nine out of ten times an army has been destroyed because its supply lines have been cut off."<sup>300</sup>

## **3. "Contingent" contracting officers**

The need to maintain close control of funds makes it inadvisable to authorize too many individuals, other than the central contracting office personnel of an installation or activity, to enter into contracts.<sup>301</sup> Yet, as earlier noted, the need for a

greater number of deployable contracting officers does exist. There is solution to this problem.

Deployable contracting officers may be issued contingent warrants. The contracting authority granted in a warrant can be limited as stated on the certificate of appointment.<sup>302</sup> By limiting the authority to deployments outside the United States, this authority will be available only when it is most needed.<sup>303</sup>

Although this may seem a novel idea, it is very similar to the contingent powers of attorney long recommended to legal assistance clients who do not wish, prior to deployment, to grant their spouse, parent, or other agent any form of authority.

### **C. Contingency contracting kits**

Commanders may also prepare, in advance, for successful contingency contracting by having their contracting office and G-4 prepare a deployment contracting kit. Items recommended for inclusion range from required forms and regulations and a handheld calculator with fresh batteries, to a catalog with pictures to use in surmounting language barriers. A list of recommended items appears at Appendix B.

In a similar vein, the 193rd Infantry Brigade (Panama) had developed a set of Contracting Instructions for Exercises (CIFE), including a "Manual for Contracting Officer's Representative" and an "Operation Guide for Field Exercise Ordering Officers." The CIFE is a comprehensive guide to planning exercises and contains detailed checklists developed on the basis of prior experience.

## **V. RECOMMENDATIONS FOR CHANGE**

Even if additional deployable contracting officers are made available, maximum use of simplified procedures is made, and deployment contracting kits are developed, further improvements in contingency contracting can still be accomplished. This section will set forth recommendations for changes to ratification procedures, small purchase limits, and real estate contracting authority.

### **A. Ratification of "Combat commitments"**

As ratification of unauthorized commitments is the only current mechanism to pay for seized or requisitioned items from public funds<sup>304</sup> this procedure requires relatively detailed examination in order to determine its effectiveness.

It may appear to be somewhat contradictory to focus on the manner in which compensation for seizures and requisitions may be efficiently paid after having strongly advised commanders not to use such measures. Yet, even though seizure and requisition are seldom to be recommended, these practices are still sometimes utilized. The most likely use in the future will be the seizure of transportation assets after a rapid airborne or light infantry deployment.<sup>305</sup> A number of vehicles were seized in Grenada, some with their owners' permission, and some proved to be tactically valuable.<sup>306</sup>

Current compensation procedures used in connection with seizure and requisition are cumbersome and primarily "punish" the owner of the property. This individual not only is deprived of the use of his property, but also has to wait an extended period of time before he is adequately compensated. Moreover, if the "commitment" is not ratified and the person who seized or

requisitioned the property cannot be located, or has no money, an unnecessary violation of international law will have been committed.<sup>307</sup>

## **1. Limitations of current ratification procedure**

The authority to ratify unauthorized commitments is strictly limited, and the process is complicated and unwieldy in a combat situation. This procedure is set forth in AFARS 1.670 (Appendix C) and discussed below.

### **a. Ratification authority**

Unauthorized commitments of up to \$2500 (the amount established for use of SFs 44) can be approved by chiefs of contracting offices, if they are delegated this approval authority by the HCA. Such authority should be delegated to the deployed contracting officer.<sup>308</sup> This delegation of authority will allow on-site ratification of some seizures. The compensation owed in connection with a seized vehicle, however, can easily exceed \$2500 if the vehicle cannot be returned in reasonable condition.<sup>309</sup> Ratification of such higher amounts must be accomplished at HCA level.<sup>310</sup> If communications prove to be a problem, as they were in Grenada,<sup>311</sup> such compensation could be difficult to arrange in a timely fashion.

### **b. Ratification process**

The process of ratification must be initiated by the "individual making the unauthorized commitments."<sup>312</sup> In the case of seizure, this individual would be the soldier who seized, e.g., the truck, or a superior who ordered it seized. The soldier may not be available to initiate the paperwork, due to enemy



action or for other reasons. Moreover, it may not be possible to identify the individual concerned. Most owners of seized vehicles in Grenada were not provided with receipts that identified the individuals who had seized the vehicles in question.<sup>313</sup>

Paperwork required to initiate ratification includes a statement of the circumstances involved, an explanation of why normal procurement procedures were not followed, a description of the "bona fide Government requirement" that made the commitment necessary, the value of any benefit received, and "any other pertinent facts" or documents.<sup>314</sup> If the commander concurs that ratification should be made, he must provide funding and describe "the measures taken to prevent a recurrence of unauthorized commitments, including a description of any disciplinary action (to be) taken...."<sup>315</sup> Further findings and recommendations must be made by a contracting officer, including the finding that the price is reasonable and that funds are available.<sup>316</sup>

A strong focus of the ratification procedure is to discourage unauthorized commitments, particularly in light of the requirement for the commander to describe disciplinary actions taken as a result of the commitment. A February 22, 1988, change to the FAR explicitly states that unauthorized commitment ratification "procedures may not be used in a manner that encourages such commitments being made by Government personnel."<sup>317</sup>

## **2. Recommended changes to the ratification process**

For those few remaining situations in which requisition under the LOW is still required, a more suitable method of compensation should be developed. This form of compensation should be referred to as a "ratification of a combat commitment,"

rather than a "ratification of an unauthorized commitment." For the sake of clarity, the term "combat commitment" will be used to refer to those "unauthorized commitments" for which change in the method of effecting compensation has been recommended.

Rather than the determinations now required for ratification by AFARS 1.670, ratification of a combat commitment should be made if

- (1) The seizure or requisition was lawful under the law of war; and
- (2) A contracting officer was not reasonably available, or use of contract procedures was not reasonably possible under the circumstances; and
- (3) Payment is required under international law.

The process should be initiated by the commander or designee of the lowest (company-size or larger) unit involved, if available. If this individual is not available, any U.S. personnel with knowledge of the facts involved should be able to initiate the paperwork. Some explanation of the circumstances should still be required, but the primary focus should be on identifying the "military necessity" for the seizure or requisition, rather than meeting the paperwork requirements now in effect. The requirement for the commander to explain how he will avoid such actions in the future should be deleted. If there was a "military necessity" for the seizure in issue, it would appear to make no sense for the commander to explain how he will "avoid" taking necessary actions in the future.

### **3. Inapplicability to low-intensity conflict**

The use of a special ratification procedure is inappropriate in a LIC environment. This procedure is intended

to provide a mechanism by which seizures and requisitions may be compensated as required under international law. As discussed earlier in the section dealing with Advice to Commanders, seizure and requisition should not occur in LIC.

Even if a situation presenting an opportunity for lawful seizure or requisition should arise in a LIC, special ratification procedures should not be required. Even in the more violent stages of a LIC, as in Vietnam, it is probable that a more elaborate support structure will exist in country. For example, in Vietnam the logistical support structure included three district engineers functioning under a U.S. Army Engineer Construction Agency.<sup>318</sup> A support structure of this nature would not exist in other deployment situations.

#### **B. Raise small purchase limits**

Deployed contracting officers would be able to function far more effectively if small purchase limits were raised from \$25,000 to \$100,000. Procedures for small purchases are streamlined,<sup>319</sup> and the use of these procedures would effectively provide much of the relief urgently recommended by individuals involved with procurement activities in Grenada.<sup>320</sup>

How many small purchases undertaken in a deployment situation would be affected by such an increase in dollar limits? During FY 1985, 60.3 percent of purchases in DOD that were over \$25,000 were also under \$100,000.<sup>321</sup> As most local purchases during a deployment will be low-dollar-value items,<sup>322</sup> the number of large purchases over \$100,000 should be very small in number.

Even greater savings of time and effort on the part of deployed contracting officers could be saved by raising the

monetary threshold for requiring competitive quotations from \$1000 to \$10,000. Approximately 15 percent of all DOD procurements fall within this range (30 percent are below \$1000).<sup>323</sup> Again, given the relatively small dollar value of procurements typically undertaken in contingency contracting, the percentage of contingency contracts falling within the \$1000 to \$10,000 range will most likely be fairly high.

### **C. Greater real estate authority outside COE**

There would appear to be little, if any, justification for allowing contracting officers other than those in the Corps of Engineers (COE) to execute "service contracts" for hotel rooms, but not allowing these individuals to execute short-term leases or ratify rental arrangements made before their arrival in country. A simple rental agreement for troop lodging is no more complex an undertaking than other forms of contracts. In fact, AR 405-10 includes a very simply rental agreement designed for use by commanders.<sup>324</sup> Conditions for its use are quite limited (e.g., the land or space leased must be in CONUS, outside urban areas, and rental for the entire period is limited to \$500),<sup>325</sup> but it demonstrates the simplicity which could be achieved.

As an alternative, a provision providing for the ratification of rental agreements up to \$1000 through other (command or contracting) channels would be most beneficial. The great majority of leases ratified by the COE in Grenada called for compensation under this amount.<sup>326</sup>

Another approach toward resolution of this issue would be increased real estate training for at least some combat engineers. Active duty engineers were present in Grenada, but none were available who possessed leasing expertise.<sup>327</sup>

If the Corps of Engineers insists on retaining exclusive real estate authority, COE real estate teams must be routinely included in those deployments during which rental agreements are likely to occur.<sup>328</sup>

## VI. CONCLUSION

Contingency contracting is not a panacea that will satisfactorily resolve all of the Army's logistical problems. Local inhabitants may not possess the supplies required. Or, they may possess such supplies, but be unwilling to part with them on reasonable terms or at a reasonable price. Potential contractors in many countries are not completely familiar with the relatively complicated, "get-it-all down in writing," U.S. method of contracting. Indeed, many U.S. contract clauses may offend potential foreign contractors.<sup>329</sup> Nevertheless, contingency contracting is a very positive step in the right direction. Some progress in this area has been made since the U.S. experience in Grenada; however, there is much more to be done. Now is the time to move beyond theory and to develop contingency contracting procedures attuned to the realities of overseas deployments.

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<sup>1</sup> See, e.g., Little & Chambers, Creative Logistics in Costa Rica, Army Logistician, Jan.-Feb. 1988, at 8; Powell & Toner, Contracting During a Foreign Exercise, Army Logistician, Jan.-Feb. 1988, at 14.

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- <sup>2</sup> See Dep't of Army, Concepts and Studies Division, Directorate of Combat Developments, U.S. Army Quartermaster School, Interim Operational Concept: Contracting for the Army in the Field, (Coordinating Draft, 17 November 1987) [hereinafter cited as Draft FM]; and P. Gilliatt, Contingency Contracting Smart Book, (August 1987) (containing a recommended Department of the Army Pamphlet).
- <sup>3</sup> C. Lowe & P. Gilliatt, Army Contingency Contracting 71 (1985).
- <sup>4</sup> See infra text accompanying notes 273 - 282.
- <sup>5</sup> See Braswell, The Big Bucks of Operation Urgent Fury, Soldier Support Journal (July/August 1984).
- <sup>6</sup> See P. Gilliatt, supra note 2, at 14. This thesis will concentrate on acquisition in areas outside the established logistical bases in Europe and Korea.
- <sup>7</sup> 2 L. Oppenheim, International Law § 143 (7th ed. 1952).
- <sup>8</sup> Generally, this applies only to enemy public movable property. See infra text accompanying notes 12 - 16 & 65 - 70; see also Dep't of Army, Pamphlet No. 27-161-2, International Law, Vol. II, at 175 (23 October 1962) [hereinafter cited as DA Pam 27-161-2].
- <sup>9</sup> DA Pam 27-161-2, at 176.
- <sup>10</sup> See, e.g., infra text accompanying note 16.
- <sup>11</sup> DA Pam 27-161-2, at 181.
- <sup>12</sup> Regulations annexed to Hague Convention IV, 1907, art. 23(g), 36 Stat. 2277, T.S. No. 539 [hereinafter cited as HR] .
- <sup>13</sup> Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 3(a) (18 July 1956) [hereinafter cited as FM 27-10].
- <sup>14</sup> See HR, supra note 12, art. 3.
- <sup>15</sup> M. Greenspan, The Modern Law of Land Warfare at 279 (1959). That last preceding phrase does, however, make the definition a bit tautological.
- <sup>16</sup> Id. See text accompanying note 10.
- <sup>17</sup> HR, supra note 12, art. 27.

18 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, [hereinafter cited as GWS] art. 19, 8 U.S.T. 3114, T.I.A.S. No. 3362.

19 International Committee of the Red Cross, Commentary. I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 293 (J. Pictet ed. 1958)

[hereinafter cited as Pictet, vol. I].

20 GWS, supra note 18, art. 35.

21 Id., art. 44.

22 Id., art. 33.

23 Id., art. 34.

24 Pictet, vol. I, supra note 19, at 279.

25 Id. at 278-79.

26 HR, supra note 12, art. 58.

27 FM 27-10, para. 405(b).

28 Id., para. 405(c).

29 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, art. 14, 249 U.N.T.S. 240 [hereinafter cited as Hague Convention on Cultural Property, 1954].

There are approximately 70 parties to the convention. The U.S. signed the Final Act of the Conference, but never ratified the Convention. 2 H. Levie, The Code of International Armed Conflict 1040 (1986).

30 Hague Convention on Cultural Property, 1954, supra note 29, art. 16.

31 See, e.g., HR, supra note 12, arts. 52, 53.

32 See, e.g., FM 27-10, para. 59(b).

33 DA Pam 27-161-2, at 184.

34 See Office of Management and Budget, Circular A-78 (Revised Aug. 4, 1983).

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- 35 M. Greenspan, supra note 15, p. 291; FM 27-10, para. 394(a).
- 36 See Kaufman v. Societe Internationale, 343 U.S. 156 (1952); see also FM 27-10, para. 394(b).
- 37 FM 27-10, para. 394(c).
- 38 Geneva Convention relative to the Treatment of Prisoners of War, August 12, 1949, art. 18, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter cited as GPW].
- 39 International Committee of the Red Cross, Commentary. III Geneva Convention relative to the Treatment of Prisoners of War, at 167, n. 2, para. B (J. Pictet ed. 1958) [hereinafter cited as Pictet, vol. III].
- 40 GPW, supra note 38, art. 18.
- 41 Id., art. 33; GWS, supra note 18, art. 30.
- 42 Pictet, vol. III, supra note 39, at 166-167.
- 43 Quoted in W. Ross & C. Romanus, The Quartermaster Corps: Operations in the War against Germany 730 (United States Army in WWII: The Technical Services, 1965).
- 44 M. Greenspan, supra note 15, at 283; see also Seery v. U.S., 127 F. Supp. 801, 805 (Ct. Cl. 1955).
- 45 FM 27-10, para. 355.
- 46 Note that the rules of occupation apply to occupation of hostile territory. This distinction is important because it eliminates the applicability of seizure and requisition to most low-intensity conflicts (LIC). The expected LIC scenario for U.S. forces will be that of a presence in a friendly foreign country in support of the legitimate government. This distinction also limited the applicability of seizure and requisition in Grenada to the combat phase of the operation. Inapplicability of seizure and requisition to most LIC is discussed in more detail infra, pp. 49-50.
- 47 2 L. Oppenheim, supra note 7, § 167.



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- 48 M. Greenspan, supra note 15, at 219.
- 49 FM 27-10, para. 357.
- 50 See M. Greenspan, supra note 15, at 219; see also 2 L. Oppenheim, supra note 7, § 187, n. 4.
- 51 See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 55, 6 U.S.T. 3516, T.I.A.S. No. 3385 [hereinafter cited as GC]; see also HR, supra note 12, art. 52.
- 52 GC, supra note 51, art. 55.
- 53 G. Benson & M. Neufeld, American Military Government in Italy in American Experiences in Military Government in World War II at 136 (C. Friedrich & Assoc. eds. 1948).
- 54 SHAEF Msg. No. 12558 to War Department, 13 Feb. 1945, reprinted in H. Coles & A. Weinberg, Civil Affairs: Soldiers Become Governors 887 (Dep't of Army, Chief of Military History, United States Army in World War II, Special Studies 1984) (the prejudice to military operations was the danger of disease caused by the use of unsanitary substitutes).
- 55 GC, supra note 51, art. 53; M. Greenspan, supra note 15, at 287.
- 56 FM 27-10, para. 401.
- 57 Pictet, vol. III, supra note 39, at 187. The U.S. practice of allowing certain confiscated items to be retained by individuals as "war trophies" does not change the general rule. As the owner of the items, the government may dispose of them by giving them to individuals without offending international law. M. Greenspan, supra note 15, at 282. In this regard, note that war trophies are specifically excluded from the provisions for compensating U.S. Army soldiers for damage to their private property incident to their military service. Dep't of Army, Regulation No. 27-20, Claims, para. 11-5(g) (10 Aug. 1987) [hereinafter cited as AR 27-20].
- 58 FM 27-10, para. 398.
- 59 DAJA-IA 1986/8019, 28 May 1986, at 2.
- 60 HR, supra note 12, art. 55.
- 61 See, e.g., M. Greenspan, supra note 15, at 288.

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- 62 HR, supra note 12, art. 58.
- 63 Hague Convention on Cultural Property, 1954, supra note 29.
- 64 2 L. Oppenheim, supra note 7, § 142.
- 65 HR, supra note 12, art. 53.
- 66 2 L. Oppenheim, supra note 7, § 137; M. Greenspan, supra note 15, at 290-291.
- 67 2 L. Oppenheim, supra note 7, § 137 n. 2 (citing a 1948 decision of the Court of Appeal of Orleans holding that a German seizure of French government wine vats conformed to Article 53 of the Hague Regulations).
- 68 See supra text accompanying notes 28 to 30 and 82 to 84.
- 69 See supra text accompanying notes 35 to 37.
- 70 See 2 L. Oppenheim, supra note 7, § 138(a), (b); see also M. Greenspan, supra note 15, at 291, n. 82.
- 71 HR, supra note 12, art. 48; FM 27-10, para. 407.
- 72 HR, supra note 12, art. 52.
- 73 2 L. Oppenheim, supra note 7, § 140.
- 74 FM 27-10, paras. 407, 412.
- 75 Lauterpacht, The Hague Regulations and the Seizure of Munitions de Guerre 1955 Brit. Y.B. Int'l L. 219, 221.
- 76 See 2 L. Oppenheim, supra note 7, § 141.
- 77 HR, supra note 12, art. 53.
- 78 2 L. Oppenheim, supra note 7, § 141.
- 79 N.V. De Bataafsche Petroleum Maatschappij & Ors. v. The War Damage Commission, 22 Malayan Law Journal 155 (1958) reproduced in 51 Am. J. Int'l L. 802 (1957) (the Singapore Oil Stocks case).
- 80 Lauterpacht, supra note 75, at 242.
- 81 HR, supra note 12, art. 52; GC, supra note 51, art. 55.
- 82 See 2 L. Oppenheim, supra note 7, § 147 (noting violations of the principal by the German army in WWI); see also M. Greenspan, supra note 15, at 301 (noting effect on title of violations of this principal in WWII).
- 83 See 2 L. Oppenheim, supra note 7, § 143.
- 84 HR, supra note 12, art. 52.
- 85 FM 27-10, para. 415.
- 86 DA Pam. 27-161-2, at 182.
- 87 FM 27-10, para. 417.

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- 88 GC, supra note 51, art. 55; HR, supra note 12, art. 52.
- 89 FM 27-10, para. 416; M. Greenspan, supra note 15, at 303 (citing British practice); 2 L. Oppenheim, supra note 7, § 147 (commenting, in regard to those prices, "...it is expected that they shall be fair.")
- 90 HR, supra note 12, arts. 49, 51.
- 91 Id., art. 51.
- 92 M. Greenspan, supra note 15, at 304.
- 93 2 L. Oppenheim, supra note 7, § 147, n. 4 and cases cited therein.
- 94 See infra pp. 24-25.
- 95 10 U.S.C. § 2303 states that U.S. contract law, specifically the Armed Services Procurement Act, applies to "procurement [by DOD, its departments, and NASA]...for which payment is to be made from appropriated funds...." The U.S. Const. art. I, § 9, cl. 7, requires a valid appropriation by Congress before any funds are taken from the U.S. treasury.
- 96 As with most contracting rules, there are exceptions. Due to space limitations, this thesis will not deal with every exception and permutation to every rule noted herein. Unless the particular exception is relevant to the issue of combat contracting, only the basic rules will be examined.
- 97 Powell & Toner, supra note 1, at 15.
- 98 Id. at 16.
- 99 That is, "most" contracts from a numerical standpoint, rather than one of total dollar value.
- 100 Telephone interview with Major Andrew Johnson (Feb. 18, 1988).
- 101 For readers unfamiliar with contracting, "termination for default" means that the contractor's goods will not be accepted, or paid for, and the contractor may be held liable to pay for any amount over the original contract's price that the U.S. must pay to obtain replacements.
- 102 See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).
- 103 Dep't of Army, Pam. No. 27-153, Legal Services - Contract Law, para. 1-3, n. 25 (25 Sep. 1988).
- 104 FAR Subpart 2.1.
- 105 DFARS Subpart 2.1.

106 See J. Cibinic & R. Nash, Formation of Government Contracts 66 (2d ed. 1986)

107 Other individuals with the authority to appoint contracting officers are listed in FAR § 1.803-1 and AFARS § 1.603-2.

108 FAR § 1.603-3.

109 The Floyd Acceptances, 74 U.S. 666 (1868).

110 Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)

111 Jascourt v. U.S., 207 Ct. Cl. 955, cert. den. 423 U.S. 1032 (1975).

112 Byrne Organization, Inc. v. U. S., 152 Ct. Cl. 578, 287 F.2d 582 (1961).

113 Defense Federal Acquisition Reg. Suppl. § 1.670(a) (1 April 1984) [hereinafter cited as DFARS]. Federal Acquisition Circular 84-33, Feb. 22, 1988, added substantially the same requirements as are found in DFARS § 1.670 to the FAR. FAR § 1.802-3.

114 Id. The additional agency requirements are found at section 1.670 of that agency's Federal Acquisition Regulation (FAR) supplement (e.g., Army FAR Suppl. § 1.670 contains the requirements that are specific to the Department of the Army).

115 A provision also affords contractors the opportunity to apply to the General Accounting Office (GAO) for payment under theories of quantum meruit or quantum valebant, but this is an illusory alternative to ratification, as the Comptroller General usually requires ratification before making payment under these theories. See, e.g., Comp. Gen. Dec. B-182584 (1974), 74-2 CPD ¶ 310.

116 7 Op. Atty. Gen. 88 (1855).

117 Interview with MAJ Johnson, supra note 100.

118 U.S. Const. art. I, § 9, cl. 7.

119 31 U.S.C. §§ 1350 and 1519. 31 U.S.C. § 1341(a) prohibits obligating or spending money before it is appropriated, or in amounts greater than the amount appropriated. 31 U.S.C. § 1342 prohibits accepting "voluntary" personal services for which payment may have to be made, except in emergencies involving protection of human life or property. 31 U.S.C. § 1517(a) prohibits spending or obligating more than the amount in a formal subdivision of an appropriation.

120 41 U.S.C. § 11.

- 121 See also Dep't of Defense, Logistics Systems Analysis Office, Acquisition Policies During Mobilization 3 [hereinafter cited as DOD Mobilization study] (draft, March 1987) (The "Food and Forage Act" also does not waive procurement regulations).
- 122 See infra text accompanying notes 288-290.
- 123 Act Dec. 19, 1985, P. L. No. 99-190, § 101(b), 99 Stat. 1202.
- 124 62 Comp. Gen. 566 (1984).
- 125 See infra notes 129-131 and accompanying text.
- 126 See infra notes 133-134 and accompanying text.
- 127 62 Comp. Gen. 566 (1984).
- 128 63 Comp. Gen. 422 (1984) (funding SDI ("Star Wars") from RDTE funds prior to a specific appropriation).
- 129 31 U.S.C. § 1502(a).
- 130 Act Nov. 14, 1986, P. L. No. 99-861, § 1351, 100 Stat. 3995.
- 131 Acts Oct. 18, 1986, P. L. No. 99-500, and Oct. 30, 1986, P. L. No. 99-591, § 101(c), 100 Stat. 3341-116.
- 132 LTC Frank L. Powell, see supra note 1, was a brigade executive officer in an infantry division when given 5 days notice prior to deploying as the contracting officer for the AHUAS TARA exercise in Honduras.
- 133 See, e.g., 1 Comp. Gen. 126 (1894); 63 Comp. Gen. 422 (1984).
- 134 36 Comp. Gen. 386 (1956).
- 135 Comp. Gen. Dec. B-208697 (Sept. 28, 1983), 82-2 CPD ¶ 2.
- 136 Emphasis added. 31 U.S.C. § 3718(b) allows debt collection fees to be deducted from the amount recovered.
- 137 22 U.S.C. § 1754(a)(2).
- 138 22 U.S.C. § 1754(a)(6).
- 139 For a brief discussion of contribution under the law of war, see supra text accompanying notes 90 to 92.
- 140 Act Dec. 19, 1985, P. L. No. 99-190, § 101(b), 99 Stat. 1202. See also 31 U.S.C. § 1306 which states that "Foreign credits owed to or owned by the Treasury are not available for expenditure by agencies except as provided annually in general appropriation laws."
- 141 See Powell & Toner, supra note 1.
- 142 63 Comp. Gen. 422 (1984).
- 143 The Floyd Acceptances, 74 U.S. 666 (1868). See also Bausch & Lomb Optical Co. v. U.S., 78 Ct. Cl. 584 (1934) (denying payment for

extra security measures, taken by a contractor during WWI, which were directed by officers who erroneously believed that they were acting for the Secretary of the Navy).

144 Newsweek, Nov. 23, 1987, at 19.

145 See HQ, Army Service Forces, Procurement Regulations Revision No. 52 para. 108.6 (11 Oct. 1945) (citing a 1944 War Dep't circular) (available in Procurement Regulations: History Set Vol. 9, Oct. 11, 1945 - June 1, 1946 in the library of The Judge Advocate General's School, Army).

146 See supra text accompanying note 142.

147 Department of Defense Appropriations Act, 1985, § 8103, P. L. No. 98-473, § 101(h), 98 Stat. 1837, 1942 (1984). For a discussion of what constitutes "incidental" humanitarian aid, see Ms. Comp. Gen. B-213137 (30 Jan. 1986) at pp. 32 - 34 of the Enclosure to that decision.

148 10 U.S.C. § 403(a).

149 10 U.S.C. § 403(b).

150 Further Continuing Appropriations, 1983, P. L. No. 97-377, Title VII, Sec. 791, of Title I, § 101(c) (Dec. 21, 1982).

151 See Dep't of Army, Reg. No. 405-10, Real Estate - Acquisition of Real Property and Interests Therein (25 May 1970).

152 Dep't of Army, Reg. No. 405-15, Real Estate - Real Estate Claims Founded Upon Contract (1 Feb. 1980).

153 See Braswell, supra note 5, at 11.

154 Johnson, supra note 100.

155 Braswell, supra note 5, at 8.

156 Letter from CPT Warren, Administrative Law Officer, to the SJA, XVIII Airborne Corps & Ft. Bragg, subject: Claims Operations in Grenada - After Action Report/Lessons Learned, 9 March 1984, para. 19 [hereinafter cited as Claims AAR].

157 P. Gilliatt, supra note 2, at 14; see also Powell & Toner, supra note 1.

158 That is, anything other than "small purchases," which will be discussed later in this thesis.

159 P. L. 98-369 §§ 2701 - 2753, 98 Stat. 1175 (July 18, 1984).

160 "Responsible" is a term of art that denotes those contractors capable of performing the contract. See FAR Subpart 9.1.

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- 161 See J. Cibinic & R. Nash, supra note 106, at 288.
- 162 See infra text accompanying notes 180 & 185; see generally FAR Part 6.
- 163 See infra text accompanying notes 170-173; see generally FAR Part 5.
- 164 See FAR § 6.003.
- 165 10 U.S.C. § 2304(a)(2)(A).
- 166 10 U.S.C. § 2304(a)(2)(B).
- 167 10 U.S.C. § 2304(a)(2).
- 168 FAR § 6.401.
- 169 Defense and Army rules are contained in part 14 of their respective supplements. For readers not familiar with acquisition regulations, material which directly correlates to rules in the FAR is identified with the same number. Added material begins at subparagraphs numbered (70) in the DFARS and (90) in the AFARS.
- 170 AFARS § 5.203.
- 171 See generally FAR Part 5, "Publicizing Contract Actions."
- 172 It is not unusual for contractors to send in a copy of the synopsis from the CBD, with a note that they want a copy of the IFB for that procurement.
- 173 FAR § 14.205-1(b).
- 174 With exceptions not worth noting here. See FAR § 14.304 if more details are desired.
- 175 FAR § 9.103(b).
- 176 FAR § 14.402.
- 177 63 Comp. Gen. 529 (1984).
- 178 See FAR § 15.403 and FAR Part 5.
- 179 See FAR § 15.406 for required clauses.
- 180 FAR § 15.805.
- 181 FAR § 15.810(a). The RFP must also advise offerors of this possibility. FAR § 15.810(a)(3)(i).
- 182 FAR § 15.810(b).
- 183 FAR § 15.810(c).
- 184 FAR § 15.811.
- 185 FAR § 10.004; Comp. Gen. Dec. B-204364.2 (8 Jan. 1982), 82-1 CPD ¶ 24.

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- 186 See infra discussion of sealed bidding; see also P. Gilliatt, supra note 2, at 46.
- 187 See supra p. 29.
- 188 See Draft FM, supra note 2, at 4-5.
- 189 193rd Infantry Brigade (Panama) Contracting Instructions for Exercises (CIFE) Sec. III, "Milestones" (undated).
- 190 10 U.S.C. § 2304(c)(2), (4), (6); FAR § 6.302-2, -4, & -6. Other exceptions may also apply, but no more than to non-contingency situations. For example, when there is only one manufacturer, anywhere, of an item (or very few sources of an item) 10 U.S.C. § 2304(c)(1) permits dealing only with the sole source. The sorts of items to be procured in a deployment are no more likely, and probably less likely, to be made by only one source.
- 191 10 U.S.C. § 2304(c)(2).
- 192 DFARS § 6.302-2(b)(6).
- 193 DFARS § 6.303-1(b)(70).
- 194 P. Gilliatt, supra note 2, at 15, 47.
- 195 10 U.S.C. § 2304(f)(5)(A).
- 196 10 U.S.C. § 2304(f)(2).
- 197 See infra note 311 and accompanying text; see also P. Gilliatt, supra note 2, at 85.
- 198 10 U.S.C. § 2304(c)(4).
- 199 10 U.S.C. § 2304(c)(6).
- 200 FAR § 6.302-6(b).
- 201 10 U.S.C. § 2304(f)(2).
- 202 Powell & Toner, supra note 1, at 18, state that determination of whether prices are fair and reasonable "is the most difficult determination the contracting officer must make during initial deployment."
- 203 10 U.S.C. § 2304(f)(3).
- 204 FAR Subpart 6.5; Dep't of the Army, Reg. No. 715-31, Procurement - Army Competition Advocacy Program (23 June 1986).
- 205 FAR § 6.301(d).
- 206 10 U.S.C. § 2304(g)(4).
- 207 FAR § 13.106(b)(5).
- 208 See FAR § 6.302-1.
- 209 See supra text accompanying note 192.



210 DFARS § 15.402(f).  
211 P. Gillatt, supra note 2, at 47.  
212 DFARS § 15.402(f).  
213 FAR § 1.403; the DOD and Army designees are listed in DFARS and AFARS sections 1.403.  
214 AFARS § 1.403(91). HCA's and PARC's are discussed supra p. 17.  
215 FAR § 1.404(b).  
216 DFARS § 1.404.  
217 AFARS §§ 1.404, 1.290(b)(6). The format for deviation requests is set forth in AFARS § 1.201-90(d).  
218 FAR § 1.404.  
219 FAR § 1.405 does not authorize deviation from a restriction which is required by a statute unless a more recent treaty conflicts with such a restriction. For the general rule that more recent statutes nullify the effect of inconsistent treaties -- for purposes of U.S. domestic law -- see Reid v. Covert, 345 U.S. 1 (1957).  
220 AFARS § 1.491.  
221 For examples of recommended FAR revisions worded to take effect only in the event of mobilization, see DOD Mobilization study, supra note 121, Appendix F, Part 2.  
222 10 U.S.C. § 2304(g)(1), (2).  
223 10 U.S.C. § 2304(g)(3).  
224 10 U.S.C. § 2304(g)(4).  
225 FAR § 5.101(a)(1). Small purchases over \$10,000 must still be synopsisized if the contracting officer does not reasonably expect to receive at least two offers if he does not synopsisize. See also supra text accompanying notes 170-173.  
226 FAR § 5.101(a)(2).  
227 FAR § 13.108(b)(5).  
228 FAR § 13.108(a).  
229 Powell & Toner, supra note 1, at 16.  
230 See Appendix A for an example.  
231 FAR § 13.108(a).  
232 FAR § 13.108(c).  
233 FAR Subpart 13.2.  
234 Id.

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- 235 P. Gilliatt, supra note 2, at 45.
- 236 Dep't of Army, Reg. No. 37-103-1, Finance Administration - Finance and Accounting for Installation Imprest Funds (29 May 1987).
- 237 FAR § 13.404(a).
- 238 Ordering officers are discussed in more detail on page 46.
- 239 P. Gilliatt, supra note 2, at 5 to 99.
- 240 AFARS § 13.405(90).
- 241 See Appendix A.
- 242 Aviation fuel and oil purchases up to \$10,000 may be made using SFs 44. DFARS § 13.505-3.
- 243 See Appendix A.
- 244 Obviously, it would be more convenient if all required clauses were contained on the form, and this problem has been recognized at DOD level. See Dep't of Defense, Logistics Systems Analysis Office, Acquisition Policies During Mobilization, at F-61 (draft, March 1987). For a list of required clauses, see DFARS § 13.507.
- 245 DFARS § 13.505-2(70)(1)(iv)(A).
- 246 P. Gilliatt, supra note 2, at 39-44.
- 247 MAJ Johnson, see note 100 supra, graciously provided several completed copies of these forms utilized in Grenada.
- 248 FAR § 13.505-3(a).
- 249 See infra text accompanying notes 283-290.
- 250 See AFARS § 1.698-1(c).
- 251 AFARS § 1.603-2(91). The format for appointing an ordering officer is contained in AFARS § 1.698-2.
- 252 Johnson, supra note 100. Major Johnson reports that although his immediate headquarters was displeased, the Joint Chiefs of Staff recognized the necessity for his actions.
- 253 For example, Army claims personnel in Grenada were at first unable to contact CONUS to determine if they had been granted single-service claims authority. Claims AAR, supra note 156, para. 2.
- 254 See P. Gilliatt, supra note 2, at 19.
- 255 10 U.S.C. § 2304(g)(3).
- 256 Johnson, supra note 100.
- 257 Braswell, supra note 5, at 8, 12.

258 USMC, The Marine Corps Development and Education Command, The Operational Overview 30 (Jan.-Mar. 1984) [hereinafter cited as USMC Grenada Overview].

259 *Id.*

260 First entry in May, 1781, quoted in H. Johnston, The Yorktown Campaign and the Surrender of Cornwallis, 1781 at 71-72 (1881).

261 See supra pp. 2-14.

262 See, e.g., Remarks by Secretary of Defense Caspar Weinberger, Conference on Low-intensity Warfare (Jan. 14, 1986).

263 General Vo Nguyen Giap, People's War People's Army (1961), quoted in J. McCuen, The Art of Counter-Revolutionary War at 80 (1966).

264 McCuen, supra note 263, at 61.

265 *Id.*

266 See, e.g., Draft FM, supra note 2, para. 2(g)(1).

267 For a general description of counter-insurgency strategy, with case studies, see Armed Forces & Modern Counter-insurgency (I. Beckett & J. Pimlott eds. 1985). During the American Revolutionary War, a prominent British merchant described the limitations of using contracts, without also providing long-term security, in terms strikingly pertinent to modern low-intensity conflict:

This American Land War ... courts Allegiance, but cannot enforce any, either by Contribution of Property, or Penalty of Person. ... We call upon the Inhabitants then, to give us assurance of their Amity & Submission, by oath or affirmation. They decline it, & won't tell us their reasons. Whether from Principle, as not inclining to our government, or from prudence, not being certain of a permanent protection .... [T]he Inhabitants [are] taking our Money, giving us good words, & making the same excuses as they did on the former occasion.

R. Oswald, "General Observations Relative to the Present State of The War. London. August 9. 1779." folios 63-64, Clements Library, Univ. of Mich., Ann Arbor, quoted in J. Sands, Yorktown's Captive Fleet at 5 (1983)

268 Pimlott, The British Army: The Dhofar Campaign, 1970 - 1975, in Armed Forces & Modern Counter-insurgency, supra note 267, at 22.

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269 Claims AAR, supra note 156, at 10.  
270 Id.  
271 Id. at 5.  
272 Johnson, supra note 100.  
273 See supra text accompanying notes 88, 89 & 93.  
274 See supra pp. 20-28.  
275 See AR 27-20, para. 10-11(b).  
276 Claims AAR, supra note 156, at 11. This after action report does not give a numerical breakdown between items seized and unauthorized attempted contracts.  
277 Braswell, supra note 5, at 10.  
278 Claims AAR, supra note 156, at 11.  
279 See DFARS § 1.870; see also infra text accompanying notes 312-317.  
280 Id. at XV-1 (2d ed. 1986).  
281 Recommended changes to the ratification process are discussed infra, pp. 58-59.  
282 See supra note 93 and accompanying text.  
283 Forces Command Msg. 131335Z Feb 84, subject: Procurement Career Programs.  
284 See sources cited supra notes 2 & 3.  
285 C. Lowe & P. Gilliatt, supra note 3, at 74; Telephone interview with Mr. P. Stephen Gilliatt of the Army Procurement Research Office at Ft. Lee, Virginia (1 Feb. 1988).  
286 Telephone interview with Captain Ken Ginter, of the Office of the Ass't Sec. of the Army for Research, Development, and Acquisition (4 Feb. 1988).  
287 C. Lowe & P. Gilliatt, supra note 3, at 74.  
288 Gilliatt, supra note 285.  
289 Johnson, supra note 100.  
290 Powell & Toner, supra note 1, at 15.  
291 See "After Action Report - Contract Support for Urgent Fury," enclosure 1 to letter from M. S. Renegar, Ass't Adjutant General, XVIII ABN Corps & Ft. Bragg, to Commander, 1st Corps Support Command, Ft. Bragg, subject: Contract Support Responsibilities for Exercises/Deployments (20 Mar. 1984) [hereinafter cited as Contracts

AAR]. For a list of the types of items procured locally during an overseas exercise, see Little & Chambers, supra note 1, at 9.

292 Gilliatt, supra note 285.

293 Johnson, supra note 100.

294 Id.

295 Powell & Toner, supra note 1, at 15.

296 AFARS § 1.698-1(a)(2).

297 Ordering officers within a contracting office are limited to placing calls under blanket purchase agreements, AFARS § 1.698-1(a)(3), but such experience is a start, and this places the ordering officer in a position to observe the small purchase "experts" at their work.

298 See, e.g., Powell & Toner, supra note 1, at 14.

299 G. Dyer, War 137 (1985).

300 Quoted in W. Karig, M. Cagle, & F. Manson, Battle Report: The War in Korea 165 (1952).

301 AFARS § 1.603-2(92) directs that the number of contracting officers "shall be kept to the minimum essential for efficient operation."

302 FAR § 1.603-3.

303 This is the approach recommended in the Draft FM, supra note 2, at 7.

304 See supra text accompanying notes 273-282.

305 See USMC Grenada Overview, supra note 258, at 30; see also DAJA-IA 1986/8019, 28 May 1986, at 3.

306 See USMC Grenada Overview, supra note 258, at 26.

307 See supra text accompanying notes 88 & 93.

308 MAJ Johnson, supra note 100, possessed ratification authority in Grenada, for example, though he reports that he did not ratify any seizures made under the LOW.

309 According to MAJ Johnson, id., most of the owners of seized vehicles in Grenada did not want the vehicles returned, they wanted to be paid the full value of the car. (Usually because the roof had been torn off the car.)

310 AFARS § 1.670-3(a).

311 See supra note 253.

312 AFARS § 1.670-3(90)(1).

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- 313 Claims AAR, supra note 156, at 10.  
314 AFARS § 1.670-3(a)(90)(1), (2).  
315 AFARS § 1.670-3(a)(90)(3).  
316 AFARS § 1.670-3(a)(92) and DFARS § 1.670-4.  
317 FAR § 1.602-3(b)(1).  
318 J. Heiser, Vietnam Studies: Logistic Support 192 (1974).  
319 See supra pp. 42-47.  
320 "The Army must change its contracting procedures during wartime operations. The procedures from peacetime cannot work during wartime because of the speed and quick reaction time required by our service units to support the Combat Commander and troops." Braswell, supra note 5, at 11. MAJ Johnson, supra note 100, expressed a similar wish: "Give us something we can operate with."  
321 DOD Mobilization study, supra note 121, at F-22.  
322 See, e.g., Little & Chambers, supra note 1, at 9.  
323 DOD Mobilization study, supra note 121, at F-52.  
324 Id., Appendix B, "Sample Short-term lease."  
325 Id., para. 2-11(a).  
326 See Contracts AAR, supra note 290.  
327 See Claims AAR, supra note 156, at 3-4.  
328 See Braswell, supra note 5, at 11.  
329 Johnson, supra note 100 .

DAC #86-4, 1 AUGUST 1987

53.3-31

## DEPARTMENT OF DEFENSE FORMS

53.303-70-DD-1155

DD Form 1155: Order for Supplies or Services  
(See 13.505-2 and 16.703(c)(72).)

ORDER FOR SUPPLIES OR SERVICES				Form Approved OMB No. 0704-0187 Expires Jul 31, 1989		PAGE 1 OF	
1. CONTRACT / PURCH ORDER NO.		2. DELIVERY ORDER NO.		3. DATE OF ORDER		4. REQUISITION / PURCH REQUEST NO.	
6. ISSUED BY		CODE		7. ADMINISTERED BY (If other than 6)		CODE	
9. CONTRACTOR  NAME AND ADDRESS		CODE		FACILITY CODE		10. DELIVER TO FOB POINT BY (Date)	
						11. MARK IF BUSINESS IS	
						<input type="checkbox"/> DEST <input type="checkbox"/> OTHER (See Schedule if other)	
						<input type="checkbox"/> SMALL <input type="checkbox"/> SMALL DISAD- VANTAGED <input type="checkbox"/> WOMEN-OWNED	
12. DISCOUNT TERMS		13. MAIL INVOICES TO					
14. SHIP TO		CODE		15. PAYMENT WILL BE MADE BY		CODE	
						MARK ALL PACKAGES AND PAPERS WITH CONTRACT OR ORDER NUMBER	
16. DELIVERY		This delivery order is issued on another Government agency or in accordance with and subject to terms and conditions of above numbered contract.					
PURCHASE		Reference your _____ furnish the following on terms specified herein.					
ACCEPTANCE. THE CONTRACTOR HEREBY ACCEPTS THE OFFER REPRESENTED BY THE NUMBERED PURCHASE ORDER AS IT MAY PREVIOUSLY HAVE BEEN OR IS NOW MODIFIED, SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH, AND AGREES TO PERFORM THE SAME.							
NAME OF CONTRACTOR _____ SIGNATURE _____ TYPED NAME AND TITLE _____ DATE SIGNED _____ <input type="checkbox"/> If this box is marked, supplier must sign Acceptance and return the following number of copies:							
17. ACCOUNTING AND APPROPRIATION DATA / LOCAL USE							
18. ITEM NO.	19. SCHEDULE OF SUPPLIES / SERVICE			20. QUANTITY ORDERED / ACCEPTED*	21. UNIT	22. UNIT PRICE	23. AMOUNT
* If quantity accepted by the Government is same as quantity ordered, indicate by X. If different, enter actual quantity accepted below quantity ordered and enclose.				24. UNITED STATES OF AMERICA		25. TOTAL	
BY:				CONTRACTING / ORDERING OFFICER		29. DIFFERENCES	
26. QUANTITY IN COLUMN 20 HAS BEEN <input type="checkbox"/> INSPECTED <input type="checkbox"/> RECEIVED <input type="checkbox"/> ACCEPTED, AND CONFORMS TO THE CONTRACT EXCEPT AS NOTED				27. SHIP NO.		28. D.O. VOUCHER NO.	
DATE _____ SIGNATURE OF AUTHORIZED GOVERNMENT REPRESENTATIVE _____				<input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL		30. INITIALS	
31. PAYMENT				32. PAID BY		33. AMOUNT VERIFIED CORRECT FOR	
<input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL						34. CHECK NUMBER	
35. I certify this account is correct and proper for payment.						35. BILL OF LADING NO.	
DATE _____ SIGNATURE AND TITLE OF CERTIFYING OFFICER _____						36. S/R VOUCHER NO.	
37. RECEIVED AT	38. RECEIVED BY	39. DATE RECEIVED	40. TOTAL CONTAINERS	41. S/R ACCOUNT NUMBER	42. S/R VOUCHER NO.		

DD Form 1155, JUL 87

Previous editions are obsolete.

CONTRACTOR MUST SUBMIT FOUR COPIES OF INVOICE

## DEPARTMENT OF DEFENSE FORMS

53.303-70-DD-1155r-1

DD Form 1155r-1: Reverse of Order for Supplies or Services/  
Request for Quotations - Foreign

REVERSE OF ORDER FOR SUPPLIES OR SERVICES/REQUEST FOR QUOTATIONS - FOREIGN	
<p><b>THIS PARAGRAPH APPLIES ONLY TO QUOTATIONS SUBMITTED:</b></p> <p>The United States Government reserves the right to consider quotations or modifications thereof received after the date indicated should such action be in the interest of the United States Government. This is a request for information and quotations furnished are not offers. When quoting complete items 12, 22, 23, 25. If you are unable to quote, please advise. This request does not commit the United States Government to pay any cost incurred in the preparation or submission of this quotation or to procure or contract for supplies or services.</p>	
<p><b>GENERAL PROVISIONS</b></p> <p><b>1. INSPECTION AND ACCEPTANCE</b> - Inspection and acceptance will be at destination, unless otherwise provided. Until delivery and acceptance, and after any rejections, risk of loss will be on the contractor unless loss results from negligence of the United States Government. Notwithstanding the requirements for any Government inspection and test contained in specifications applicable to this contract, except where specialized inspections or tests are specified for performance solely by the Government, the contractor shall perform or have performed the inspections and tests required to substantiate that the supplies and services provided under the contract conform to the drawings, specifications and contract requirements listed herein, including if applicable the technical requirements for the manufacturers' part numbers specified herein.</p> <p><b>2. VARIATION IN QUANTITY</b> - No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.</p> <p><b>3. PAYMENTS</b> - (a) Invoices shall be submitted in quadruplicate (one copy shall be marked "Original") unless otherwise specified, and shall contain the following information: Contract or order number, item number, contract description of supplies or services, dates, quantities, unit prices (exclusive of taxes or duties for which relief is granted) and extended totals. Bill of Lading number and weight of shipment will be shown for shipments on United States Government Bills of Lading or freight warrants. Unless otherwise specified, payment will be made on partial deliveries accepted by the United States Government when the amount due on such deliveries so warrants. (b) The Contractor will list on the final invoice by name, rate and total amount, all taxes or duties excluded from the contract prices.</p> <p><b>4. DISCOUNTS</b> - Discount time will be computed from the day following the date of delivery at place of acceptance or from receipt of correct invoice at the office specified by the United States Government, whichever is later. Payment is made, for discount purposes, when check is mailed.</p> <p><b>5. DISPUTES</b> - (See Schedule)</p> <p><b>6. UNITED STATES OFFICIALS NOT TO BENEFIT</b> - No member of, or delegate to, the Congress of the United States of America, or resident commissioner of the United States of America shall be admitted to any share or part of this contract, or to any benefit that might arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.</p> <p><b>7. COVENANT AGAINST CONTINGENT FEES</b> - The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the United States Government shall have the right to annul this contract without liability, or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.</p> <p><b>8. GRATUITIES</b> - (a) The United States Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the United States Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; provided that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court. (b) In the event this contract is terminated as provided in paragraph (a) hereof, the United States Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee. (c) The rights and remedies of the United States Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.</p> <p><b>9. RENEGOTIATION</b> - This contract, and any subcontract hereunder, shall be subject to the extent required by law, to the Renegotiation Act of 1951 (50 U.S.C. APP 1221), or seq., as amended. However, for information of the Contractor it is generally true that a contract, wholly performed outside the United States, its possessions and Puerto Rico which is with an individual who is not, or with a partnership, or joint venture whose members are not,</p>	
<p>nationals of the United States, or which is with a corporation not organized under the laws of the United States or any state or possession thereof, or Puerto Rico, or not owned by U. S. nationals, is exempt from this act.</p> <p><b>10. TAXES</b> - (a) The contract price, including the prices in any subcontracts hereunder, does not include any tax or duty which the Government of the United States and the Contractor's government have agreed shall not be applicable to expenditures made by the United States in the Contractor's country, or any tax or duty from which the Contractor, or any subcontractor hereunder, is exempt under the laws of the Contractor's country. If any such tax or duty has been included in the contract price, through error or otherwise, the contract price shall be correspondingly reduced. (b) If for any reason after the contract date, the Contractor is relieved in whole or in part from the payment or the burden of any tax or duty included in the contract price, the contract price shall be correspondingly reduced.</p> <p><b>11. EXAMINATIONS OF RECORDS</b> - The following clause is applicable only to orders which exceed \$2,500 or equivalent local currency, and to the extent required by the laws and regulations of the U.S.:</p> <p>(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to, and the right to examine, any directly pertinent books, documents, papers, and records of the Contractor, involving transactions related to this contract.</p> <p>(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agree that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to, and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in the clause excludes (i) purchase orders not exceeding \$2,500 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.</p> <p><b>12. ASSIGNMENT</b> - This Purchase Order may not be assigned.</p>	
<p><b>ADDITIONAL GENERAL PROVISIONS</b></p> <p><b>13. CHANGES</b> - The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the United States Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for performance of this contract, whether changed or not changed by any such order, an equitable adjustment shall be made by written modification of this contract. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change provided that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim if asserted prior to final payment, under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.</p> <p><b>14. TERMINATION FOR DEFAULT</b> - The Contracting Officer, by written notice, may terminate this contract, in whole or in part, for failure of the Contractor to perform any of the provisions hereof. In such event, the Contractor shall be liable for damages, including the excess cost of procuring similar supplies or services, provided that, if (i) it is determined for any reason that the Contractor was not in default or (ii) the Contractor's failure to perform is without his or his subcontractor's control, fault or negligence, the termination shall be deemed to be a termination for convenience under paragraph 15.</p> <p><b>15. TERMINATION FOR CONVENIENCE</b> - The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the United States Government. If this contract is for supplies and is so terminated, the Contractor shall be compensated in accordance with Section VIII of the Armed Services Procurement Regulation, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the United States Government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.</p>	
<p><b>ACCEPTANCE</b></p> <p>The Contractor hereby accepts the offer represented by this numbered purchase order as it may previously have been or is now modified, subject to all of the terms and conditions set forth, and agrees to perform the same.</p>	
<p>NAME OF CONTRACTOR</p>	
<p>SIGNATURE</p>	
<p>TYPED NAME AND TITLE</p>	
<p>DATE</p>	
<p>REMARKS</p>	

DD FORM 1155r-1

PREVIOUS EDITIONS ARE OBSOLETE.

DOD FAR SUPPLEMENT



U.S. GOVERNMENT

**PURCHASE ORDER—INVOICE—VOUCHER**

Anyone who finds this booklet, please notify:

OFFICE:

TELEPHONE NUMBER:

NSN 7540-01-152-8068  
PREVIOUS EDITION USABLE  
44-108

STANDARD FORM 44 (Rev. 10-83)  
PRESCRIBED BY GSA.  
FAR (48 CFR) 53.213(c)

*(This form is for official Government use only)*

(b) Distribution of copies when payment is by cash is the same as described above, except that Copy No. 1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instructions pertaining to handling receipts for cash payment.

## FURNISH SUPPLIES OR SERVICES TO (Name and address)\*

[illegible]

TOTAL
DISCOUNT TERMS
..... % ..... DAYS
DATE INVOICE RECEIVED

ORDERED BY (Signature and Title)

### PURPOSE AND ACCOUNTING DATA

**PURCHASER—***To sign below for over-the-counter delivery of items*

RECEIVED BY

TITLE

DATE \_\_\_\_\_

**SELLER**—Please read instructions on Copy 2

☐ PAYMENT  
RECEIVED

\$.....

☐ PAYMENT REQUESTED

.....  
 \$.....

**NO FURTHER INVOICE NEED BE SUBMITTED**

**SELLER**

DATE \_\_\_\_\_

BY

.....  
(Signature)

I certify that this account is correct and proper  
for payment in the amount of

2

## DIFFERENCES

**ACCOUNT VERIFIED:**

**CORRECT FOR**

(Author's certifying officer)

☐ CASH

DATE PAID

VOUCHER NO.

**OR** .....

(Chart No.)

### 1. SELLER'S INVOICE

(See Instructions on Copy 2)

STANDARD FORM 44a (Rev. 10-83)  
PRESCRIBED BY GSA.  
FAR (48 CFR) 53.213(c)

[illegible][illegible]



## Chapter 6, Department of the Army Pamphlet 715-XX, Procurement - Contingency Contracting (Draft)

### Contingency Contracting Kit

#### 6-1. Planning

One should keep in mind that in a contingency operation, anything forgotten may be difficult to obtain once the area of operation is reached. The deployable contracting officer should, therefore, assemble or obtain a suitable deployment kit. The exact contents should be determined by the contracting officer after being informed of the overall contingency support mission. Most of the kit's contents should be reasonably obtainable from the local contracting office; however, some forms may require an order to a forms distribution point.

#### 6-2. Contracting office responsibility

Contracting offices that anticipate involvement in supporting a contingency contracting deployment should, in the interest of time and responsiveness, take the necessary steps to assemble the listed items described in paragraph 6-3. This would allow the contracting officer designated to support a deployment to pick up the kit upon alert notification rather than spending essential time trying to assemble his/her own.

#### 6-3. The minimum contents of a kit

a. Each kit should include a 90-day supply of contract and cash control forms such as:

(1) DD Form 1155, Order for Supplies or Services/Request for Quotations

(2) DD Form 1155r-1, Reverse of Order for Supplies or Service/ Request for Quotations-Foreign (Note: This form is often not available, in which case substitute DD Form 1155r, General Provisions.)

(3) Standard Form 26, Award/Contract

(4) Standard Form 36 or Optional Form 336, Continuation Sheet

(5) Standard Form 30, Amendment of Solicitation/Modification of Contract

(6) Standard Form 1409, Abstract of Offers

(7) Standard Form 1419, Abstract of Offers-Construction

(8) Standard Form 44, Purchase Order-Invoice-Voucher

(9) DD Form 1131, Cash Collection Voucher

(10) DA Form 3953, Purchase Request and Commitment

(11) DD Form 1594, Contract Completion Statement

(12) DD Form 1784, Small Purchase Pricing Memorandum

b. A list of authorized Procurement Instrument Identification (PIIs) numbers (DFARS 4.70 - Uniform Procurement Instrument Identification Numbers). These numbers should be provided by a sponsoring support contracting activity, normally the activity where the contracting officer deploys from or is based. If a sponsoring activity provides the numbers, this will greatly aid in the collection of contingency contracting data by facilitating the incorporation of that data into the sponsoring activities files and records. Otherwise the contracting officer must develop and use his/her own numbers, which could complicate data collection at the end of the contingency when the files need to be closed out and transferred to the sponsoring support contracting activity.

c. Catalog(s) with pictures of supplies. Because of possible language barriers as well as the inability of the customer to verbally describe requirements, catalogs with pictures of supplies could be very useful. At a minimum the catalogs should contain pictures of both hardware and construction supplies.

d. Administrative and other supplies such as:

(1) Office supplies (pencils, pens, paper, stapler, staples, carbon paper, folder labels, etc)

(2) Contract file folders (These should be obtained from the sponsoring contracting activity)

(3) Handheld calculators and batteries

(4) Cash box (If an imprest fund cashier will be designated)

(5) Flashlight and batteries

(6) Sample contract formats

(7) Authority to carry sidearm, DA Form 2818, Firearms Authorization. (Sidearm and ammunition to be issued by the unit to be supported in the event of deployment)

(8) SF 1402, Certificate of Appointment, issued by the Head of the Contracting Activity (HCA) or the Principal Assistant Responsible for Contracting (PARC)

e. Currency supply and information. Except where the contingency contracting officer will be accompanied by an imprest fund cashier designated prior to deployment, there is no need for the contingency contracting kit to include cash or U.S. Treasury checks. If an imprest fund cashier is designated prior to deployment, the cash needed to establish the imprest fund will be the responsibility of the cashier, who will draw it immediately prior to actual deployment. Obtaining cash or U.S. Treasury checks is the

responsibility of the Finance and Accounting Office from which the Theater/Corps Finance Group will be drawn. In accordance with the OPLAN, the determination of the amount needed and the identification of banking facilities where U.S. cash and checks can be exchanged for local currency is the responsibility of the designated Finance and Accounting Office. DFARS 25.501(a) requires that offshore contracts with local firms be priced and paid in local currency. Use of U.S. currency requires a Status of Forces agreement providing for payment in U.S. currency.

f. To the extent that the geographic area of deployment can be anticipated, "Area Handbooks" in the DA PAM 550 series should be included. The handbooks provide information on religion, customs, languages, etc., which would be useful in avoiding inadvertently offending the natives. Additional information can be obtained on deployment from the civil affairs officer and the State Department.

#### 6-4. Optional contents of a kit

The kit contents previously mentioned in the above paragraph are considered minimal. Additional items may be added to the kit at the option of the designated contracting officer. For example, including photocopies of the various FAR/DFARS/AFARS cites referred to in this pamphlet might later prove useful.



## ARMY FAR SUPPLEMENT

### 1.670 Ratification of Unauthorized Commitments.

**1.670-1 Authority.** Only Contracting Officers acting within the scope of their authority may enter into contracts on behalf of the Government (see 1.602-1). Subject to the limitations and in accordance with the procedures prescribed below, certain Contracting Officers may ratify actions initiated or approved by officers or employees of the Department of the Army who did not have requisite authority to enter into contracts on behalf of the Government, and which resulted in supplies delivered or services rendered to, and accepted by, the Government, and the submission of a request for compensation.

### 1.670-3 Procedures.

(a) The cognizant Head of a Contracting Activity may approve individual ratification actions in accordance with this paragraph. Each Head of Contracting Activity may delegate, without authority to redelegate, the authority to approve ratification actions hereunder.

(1) with respect to amounts of \$25,000 or less, to a Principal Assistant Responsible for Contracting, and

(2) with respect to amounts of \$2,500 or less, to Chiefs of Contracting Offices.

(90) The individual making the unauthorized commitments shall forward to his or her Commander or Agency head (or senior staff officer designated for this purpose) documentation concerning the transaction, which shall include:

(1) a statement signed by the individual describing the circumstances, why normal procurement procedures were not followed, what bona fide Government requirement necessitated the

commitment, whether any benefit was received, its value, and any other pertinent facts; and

(2) all other relevant documents including orders, invoices, or other documentary evidence of the transaction.

(91) If the Commander or agency head (or designee) concurs that the commitment should be ratified, the documentation described in paragraph (c) above shall be forwarded to the Chief of the cognizant contracting office with an endorsement that:

(1) verifies the accuracy and completeness of the documentation;

(2) describes the measures taken to prevent a recurrence of unauthorized commitments, including a description of any disciplinary action (to be) taken under paragraph 2-1f, AR 600-50, or other applicable authority; and

(3) provides a complete purchase description and funding for the ratifying contract.

(92) The Chief of the Contracting Office to whom a proposed ratification action has been forwarded will assign the action to an individual Contracting Officer for processing. The Contracting Officer assigned will be responsible for:

(1) reviewing and determining the adequacy of all facts, records, and documents furnished, and for obtaining any additional material required (see also Defense FAR Supplement 1.670-4).

(2) preparing a summary statement of facts addressing the foregoing to include a recommendation as to whether the transaction should be ratified stating reasons therefor. Advice against the ratification should include a recommendation as to whether the matter should be processed under FAR and DOD FAR Supplement Part 50 (Public Law 85-804) or as a GAO claim, or for other appropriate disposition.

(93) The individual responsible for approving the ratification (see 1.670-3(a)), upon receipt and review of the complete file, may approve the ratification if the individual deems it in the best interest of the Government, or direct other disposition as appropriate. Acquisitions which have been approved for ratification will be forwarded to the appropriate contracting office for issuance of purchase orders or other contract documents for payment purposes.

(94) Heads of Contracting Activities shall monitor compliance with this paragraph 1.670-3 and shall take all necessary corrective action.

#### ARMY FAR SUPPLEMENT

AL 87-34

1.6-9

1.670-4 Limitations on Exercise of Authority. Unauthorized commitments shall not be ratified if:

(90) made to circumvent or evade the procurement statutes and regulations;

(91) there is a genuine doubt concerning a question of law or fact;

(92) the transaction would not otherwise have been valid if made by a properly authorized Contracting Officer;